Submission to the LegCo Panel on Administration of Justice and Legal Services: Prosecution policy and procedure arising from the case of Mr. Chung Yik-tin

Response to Information Paper on Mr. Chung Yik-tin's case: LC Paper No. CB(2)1203/07-08(02)

THE LEGITIMACY OF CRIMINALISING TRANSFERS OF OBSCENE MATERIAL IN HONG KONG

Dennis J. Baker[*]

Overview

This submission is rather technical in places, but the deeper moral issues need to be engaged with if we are to achieve justice. The submission does not focus directly on the adequacy of prosecution policy and procedure arising from Mr Chung-Yik-tin prosecution. But rather it addresses an even more fundamental question: why prosecute at all in such cases? The issue is whether the offence which Mr. Chung Yik-tin was charged with should be abrogated. Thus, in this submission I address the underlying issue of whether it is appropriate to criminalise transfers of obscene and indecent material generally. This is clearly an issue that needs to be addressed and the Mr. Chung-Yik-tin inquiry should be widened to address this fundamental question. 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 C*ontrol 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 all transfers by all parties (including consenting adults) of all forms of obscene and indecent materials. The laws unnecessarily violate the free expression rights of both the producer and consenting viewer of the offensive materials. The producer/publisher of such materials does not harm his or her audience as they willingly view such materials. The justification for maintaining a blanket prohibition against all transfers of such materials is not reconcilable with justice and fairness and is utterly out of touch with modern life in Hong Kong. The proponents of such laws have used Victorian positive morality considerations to justify continued criminalisation. 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. Criminalisation should be limited to those offences that target children or use children in the production process, violate the rights of non-consenting adult audiences not to receive certain intimate information in certain public contexts, and violate privacy rights by publishing a person's private and intimate information without consent. If *x* obtains *y's* profoundly private information and publishes it without *y's* consent, then *x* violates *y's* privacy rights in a grave way. The violation in the right circumstances will justify a criminal law response rather than a mere civil law response. Similarly, if *x* and *y* copulate on a public bus they subject the captive audience to an offensive display which violates the non-consenting audience's right not to receive certain intimate information. I argue below that these types of privacy violations give the lawmaker a legitimate justification for invoking the criminal law.

I. JUSTIFYING CRIMINALISATION

[*] (M.Phil, Ph.D. Jesus College, Cambridge). Assistant Professor, School of Law, Chinese University of Hong Kong. Professor Baker teaches criminal law procedure and is an expert in criminal law and criminalisation theory. Professor Baker has published papers on this topic in the United States, England and Australia. Contact: drbaker@cuhk.edu.hk

I maintain that the concepts of fairness and just-deserts have a role to play in a general theory of 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 requirements justice when they are reconcilable with critical (objective)[1] accounts of fairness and justice. Positive morality (community or conventional morality as it is sometimes labelled) will not do. Herbert Hart[2] 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. I assert that 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 she is ultimately labelled as a criminal—is censured and punished. I assert that the general justifying aim of punishment is intrinsically connected with the general justifying aim of criminalisation.[4] Punishment is merely a part of the criminalisation process.[5] It is not the crime label *per se* that causes an offender to suffer, but rather it is the penal consequences flowing from the criminal label.

---

[1] A 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) *Philosophy and Public Affairs* 87. See also David Wiggins, *Ethics, Twelve Lectures on the Philosophy of Morality*, (Cambridge: Harvard University Press, 2006) at chapters 11 & 12 (2006); Brian Leiter, *Objectivity in Law and Morals*, (Cambridge: Cambridge University Press, 2001); Andrei Marmor, *Positive Law and Objective Values*, (Oxford: Clarendon Press, 2001); Hilary Putman, "The Meaning of 'Meaning,'" in *Mind, Language, and Reality*, (Cambridge: Cambridge University Press, 1975).

[2] Herbert Hart, *Law, Liberty and Morality*, (London: Oxford University Press, 1963), p 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 *Australian Journal of Legal Philosophy*.

[3] As 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, *Defining Crimes: Essays on the Special Part of the Criminal Law*, (Oxford: Oxford University Press, 2005), p 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 ingnored'. See J. R. Lucas, *Responsibility*, (Oxford: Clarendon Press, 1993) p 101.

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

[5] As 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), p 6.

Criminalisation and its penal consequences aim to protect members of society 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 crime label alone does not inflict pain on the convicted person, but rather it is the censure, stigmatisation and hard treatment that are an intrinsic part of the penal aspect of the criminalisation process that causes the convicted to suffer. Criminalisation aims to prevent[7] harm and injury but it is the fairness (just deserts) constraint that could ensure justice.[8] 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 desert-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 her wrongdoing makes her deserving of criminalisation. Criminalisation should only target those who deserve proportional retribution for objective wrongdoing of a kind that is worthy of criminal condemnation. Conduct should not be criminalised merely for the purpose of preventing crime. As von Hirsch notes:[9]

> [R]eprobation accounts of the institution of the criminal sanction are those that focus on that institutions condemnatory features, that is, its role as conveying censure and blame. The penal sanction [criminalisation] clearly does convey blame. Punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has

---

[6] Herbert Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Clarendon Press, 1968), pp 8-9.

[7] Professors 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 and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles*, (Oxford: Oxford University Press, 2005) p 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, n 5 above, pp 10-14.

[9] Ibid at p 9.

> committed a wrong, in a manner that expresses disapprobation of the person for his conduct. Treating the offender as a wrongdoer is central to the idea of punishment.

Censure is about holding an actor accountable for his or her wrongful choices. 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 her culpable and responsible choice to injuriously wrong others. The core link between penal theory and criminalisation theory more generally 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. Criminalisation not only involves censure and hard treatment, but it also limits our choices. Von Hirsch's retributive constraint reconciles preventive criminalisation with fairness, not only because he considers 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 because he asserts that prevention has to be achieved within the just-deserts framework. The first requirement of just deserts is to demonstrate that the unwanted conduct is *prima facie* wrongful and objectively harmful or has other objective consequences that are worthy of criminalisation.

II. PRINCIPLED CRIMINALISATION

The issue of what objective reasons there are to justify criminalising conduct is a huge philosophical question, which cannot be fully addressed in this paper. I do not aim to provide an exhaustive set of objective principles/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 criminalisation.[10] The fairness requirement will be satisfied in most cases by referring to the harm justification,[11] as wrongful harm to others provides an objective justification for invoking the criminal law in a wide range of situations. Unquestionably, there are other

[10] As 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 reprehensibleness (that is, the harmfulness and culpability) of the actor's conduct": von Hirsch and Ashworth, n 7 above, p 4.

[11] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, Vol. I, (New York: Oxford University Press, 1984).

objective principles/reasons/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 harmless[12] but grave privacy violation) that *deserve* the crime label, she will suffer the penal consequences that are a part of the condemnatory process of 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*[13] 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.

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

[12] The 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, Law Suits and Celebrities Caught on Tape," (New York: *N.Y.Times*, March 19 2006). See also the discussion infra 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 was reported that he had visited a strip club and could not remember what he did there. See Tim Johnston, "Prime Ally of Bush Is Defeated in Australia," (New York: N.Y.Times, November 25, 2007).

[13] John Stuart Mill, *On Liberty and Other Essays*, (Oxford: Oxford University Press, 1991), p 14.

the Wolfenden Committee, [14] referring to the 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) was a sufficient justification for criminalising conduct. He alleged that private vice had the potential to cause both physical and spiritual (tangible and intangible) harm to society.[15] 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".[16]

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.[17] Devlin's positive morality type harm argument is a variant of his extreme thesis,[18] which advocates that conduct is criminalisable so long as it breaches the majority's moral code.[19] In *HKSAR v. Chan Man Lung* [2004] 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.

---

[14] Wolfenden Committee, *Report of the Committee on Homosexual Offences and Prostitution*, (London: Home Office, Cmd. 247, 1957), paragraphs 13 and 61.
[15] Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1965), p 111.
[16] Ibid.
[17] Hart, n 2 above, 53-55.
[18] Ibid p 54.
[19] "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, n 15 above, p 25.

The Devlin community morality justification also permeates the *Control of Obscene and Indecent Articles Ordinance*. 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 expatriates, the middle class, the artists, the academics; it is not clear. In Hong Kong, the anachronistic terms found in the 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, and so on. Criminalising innocent activities merely because it might help to prevent harm, offence or injury (others from being corrupted) to others is not acceptable.[23] In the

---

[20] "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), p 1820.

[21] Ibid p 1822.

[22] Ibid.

[23] The 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; *Knuller (Publishing, Printing and Promotions) Ltd. v. DPP* [1973] A.C. 453. There are four core reasons why such arguments can be dismissed. Firstly, such an 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. 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(3) *New Criminal Law Review* 370. For a very compelling account of the wrongness of using paternalism as a justification for

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* [1998] 1 HKLRD 48, 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.[25]

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 universal normative quality.[26] 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 context public concern about people being corrupted by receiving obscene information], not in what is *rigorously rational* [sound normative principles based on fairness

---

criminalisation see Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, Vol. III, (New York: Oxford University Press, 1986).

[24] 394 U.S. 557, p 567.

[25] Jeffrie Murphy, "Another Look at Legal Moralism," (1966) 77(1) *Ethics* 50 at p. 54.

[26] A 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), pp 22 et seq. See more generally, J. R. Lucas, *On Justice*, (Oxford: Clarendon Press, 1980).

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".[27] 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.[28]

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 to 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 circumstances.[29] 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".[30] In his two later volumes he makes it explicitly clear that legal moralism and legal paternalism are insufficient grounds for criminalising conduct.[31] 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

---

[27] Harold N. Lee, "Morals, Morality, and Ethics: Suggested Terminology," (1928) 38(4) *International Journal of Ethics* 450, p 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": Herbert Hart, "Social Solidarity and the Enforcement of Morality," in *Essays in Jurisprudence and Philosophy*, (Oxford: Clarendon Press, 1983), pp 248 *et passim*. For a further convincing example of reason-sensitive morality see Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986).

[28] "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": Dworkin, n 26 above, p 250.

[29] Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others*, (New York: Oxford University Press, 1985), p 1.

[30] Ibid p xiii.

[31] Feinberg, Vol. III, n 23 above; Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, Vol. IV, (New York: Oxford University Press, 1988).

interests of the victim and it must be brought about by the (culpable *i.e.*, intentional—inexcusable/unjustifiable) wrongdoing 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 argued 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.[32] 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.[33] Even gross offences such as public displays of earrings made from human foetuses,[34] 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".[35] 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 embarrassment)".[36] Offense might leave the victim feeling annoyed, disgusted, harassed, invaded, violated, disappointed, frightened, anxious, and so forth.[37] Some liberals have suggested that the harm principle could be expanded to cover the worst

[32] Feinberg, Vol. II, n 29 above, p 1.
[33] Similarly, in Hong Kong there is no need for the criminalised offence to cause harm: *East Touch Publisher v. Television and Licensing Authority* [1996] HKLY 41.
[34] *R v. Gibson* [1991] 1 All E.R. 649.
[35] Feinberg, Vol. I, n 11 above, p 48.
[36] Ibid.
[37] Feinberg, Vol. II, n 29 above, p at 1.

kinds of offence,[38] but such interpretations seem to stretch the concept of harm to the extent that it becomes meaningless as a liberty protecting mechanism.[39]

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,[40] 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 common on many European beaches. Furthermore, topless swimming is permissible on 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 the corridor of the Cambridge University Law Faculty. 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,[41] but might go unnoticed in London, New York or Stockholm. The site of an interracial couple could cause profound offence in the Deep South of the United States, but might not even be noticed in Hong Kong. The concept of offence is rooted in positive morality and social convention. Therefore, it is essential to provide an account of what makes offence criminalisable in an objective sense.

Offense 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

---

[38] Harlon. L. Dalton, "Disgust and Punishment," (1986-1987) 96 *Yale Law Journal* 883. 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 and Andrew Simester, *Incivilities: Regulating Offensive Behaviour*, (Oxford: Hart Publishing, 2006), pp 149-171.

[39] For 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," (1999-2000) 90 *Journal of Criminal Law and Criminology* 109.

[40] Intentionally 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, n 27 above, p 414.

[41] *Lawrence v. Texas*, 539 U.S. 558 (2003).

of criminalisable *wrongful* offence. He also fails to demonstrate that offence *per se* has consequences of a kind that warrant criminalisation. Feinberg[42] 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.[43] 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".[44] In the normative sense it only refers to those disliked mental states that are caused by the wrongful (*right violating*) conduct of others.[45]

Offense 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".[46] 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".[47] 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.[48] Offense 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 [person's] *rights*".[49] 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 wrongfulness 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".[50]

---

[42] Feinberg, Vol. II, n 29 above, pp 1-3.
[43] Ibid pp 1-2.
[44] Ibid p 2.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid pp 2-3.
[49] Ibid p 2.
[50] Ibid.

But what makes the offence unjustifiable or inexcusable? Feinberg tries to answers 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 factors:[51] (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.[52] (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 reasonableness[53] (*scilicet*, 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 displays[54] 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 the ethical environment in proportion to what its numbers and tastes justify.[55] A balance is struck between majoritarian claims and minority claims so that minorities are able to have some impact in our plural society.[56] 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".[57] This also ties in with Feinberg's final mediating maxim, which takes

---

[51] Ibid p 44.
[52] Feinberg asserts that: "No amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered personal expression": ibid pp 38-39.
[53] Ibid.
[54] Von Hirsch and Simester call this requirement the readily avoidability principle. Von Hirsch and Simester, n 38 above, pp 125-128.
[55] Ronald Dworkin, *Sovereign Virtue*, (Cambridge: Harvard University Press, 2000), p 214.
[56] Ibid.
[57] Von Hirsch and Simester, n 38 above, pp 125-128.

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.

Feinberg[58] 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".[59] 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".[60] This is an important normative consideration, but Feinberg seems to be using mediating factor to prevent conduct that is not *prima facie* criminalisable from being criminalised.[61] 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 trying to say when he cites the reasonableness of such conduct. However, I think a fuller account the moral rightfulness of such conduct is required if we are to protect a wide range of activities.

Von Hirsch and Simester[62] assert that it is the *wrongness* of certain offensive acts that provides the objective moral justification for criminalisation. They argue that argue that exhibitionism is criminalisable because it treats the non-consenting viewer with a lack of respect and consideration. But mere wrongdoing does not provide sufficient guidance to the lawmaker about what to criminalise. There are many acts that treat people with a lack of

---

[58] Feinberg, n 29 above, pp 27-28.
[59] Ibid.
[60] Ibid p 29.
[61] Andrew von Hirsch, "Toleranz als Mediating Principle." in Andrew von Hirsch, Kurt Seelmann and Wohlers Wolfgang, *Mediating Principles*, (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 2006), pp 97-110.
[62] Von Hirsch and Simester, n 38 above, pp 122-126.

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.[63] What distinguishes false promising from the act of uploading nude photos of a non-consenting adult onto the World Wide Web? Distributing nude photos without consent is criminalisable because this type of offensive conduct has a particular *normative consequence*: that is, it causes a gross loss of privacy. It is this particular wrongful 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 their harm doing. Furthermore, those who view such materials deserve criminalisation regardless of whether they come into contact with the children who are used to produce the material, because they indirectly harm children by possessing child pornography. I have argued elsewhere that mere possession of child pornography can be criminalised even if the possessor does not directly harm the children who were used to produce it.[64] 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 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

[63] A 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, n 2 above. See also John Gardner and Stephen Shute, "The Wrongness of Rape," in Jeremy Horder, *Oxford Essays in Jurisprudence*, (Oxford: Oxford University Press, 4th Series, 2000).
[64] Baker, n 23 above, pp 386-388.

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.[65]

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 and receiver's freedom of expression rights without justification. The freedom of expression right is based on fundamental norms[66] and should only be overridden in exceptional circumstances. Hence, if couple *x* and *y* want to upload (publish, circulate) 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 and publishers of obscene and indecent materials use images of consenting adults,[67] 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 publish and obscene story such as Portnoy's Complaint, which has been credited as being Philip Roth's most popular novel, then he or

---

[65] Ibid.

[66] Baker 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), p 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), pp 199-200.

[67] Consent 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," [2008] 11 *New Criminal Law Review* (forthcoming); Dennis J. Baker, "Rethinking Consensual Harm Doing," (2008) *ALTA Proceedings*.

she should be free to do so.[68] The 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.[69] 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*. Even if the aforementioned letter were exempted, it is clear that sending pornographic videos to a retailer 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.[70] However, the material would have to be of an exceptionally private nature (especially for public figures who gain benefits from public 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 here, 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 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 of 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

---

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

[69] *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* (CFA) [1988] 2 HKLRD 857 and *Ming Pao Newspaper Ltd. v. Commissioner for Television and Entertainment Authority* (1997) 7 HKPLR 314.

[70] For example, 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." See Alan Cowell, "British Police Arrest 3 Over Taps on Phones at Royal Residence," (New York, *N.Y.Times*, August 9, 2006).

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 privacy and consent rather than merely on obscenity and indecency. However, trivial or moderate privacy violations should not be criminalised, as the civil law provides adequate remedies.[71] 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".[72] For every day mums and dads it would not be feasible to lodge expensive civil proceedings to protect their medical and banking details, *etc.* Therefore, data protection laws[73] are needed to protect their privacy. But a celebrity/politician and so on is not entitled to have this type of moderate information protected by the criminal law. A celebrity/politician should only be able to use the criminal law to protect his or her privacy when there has been an extraordinarily grave violation of his or her privacy.

Free speech, public transparency and accountability means 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 taxed[74] 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

---

[71] See *Douglas & Ors. v. Hello! Ltd & Ors.* [2003] EWHC 786; 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* (1993) A. Def. R. [51,065] (SC (N.S.W.) where the violation clearly should have been criminalised.

[72] Feinberg, n above 11, p. 26.

[73] I 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 for example, *Crimes Act 1900* (N.S.W.) Part 6 and *Criminal Code Act 1995* (Cth.) Part 10.7; *Data Protection Act 1998* (U.K.).

[74] When a celebrity is paid many 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 Publishing, 2006). To the extent, that parents were complaining about the celebrities who were tied up in the recent Hong Kong "nude-photo-gate" scandal (see n 77 below) 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.*

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.[75]

But there are limitations. Distributing private information clearly violates the privacy of the non-consenting victim. I am of the view that 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,[76] is it is something entirely different to publish images of that person having actual intercourse or of that person in the nude.[77] 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.

Gavison[78] postulates that an individual enjoys an 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

---

[75] For 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," Posted Tue Feb 12, 2008 Australian Broadcasting Corporation: <http://www.abc.net.au/news/stories/2008/02/12/2160093.htm>

[76] For instance, the media have a freedom of speech interest in reporting about Sarkozy's romance. However, it would have no right to publish obscene photos of the couple. Ian Fisher, "Sarkozy in Rome: Affairs of State and the Heart," (New York, *N.Y.Times*, December 21, 2007).

[77] See for example, 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," (New York, *N.Y.Times*, February 13, 2008). It is worth noting, that to the extent that some might argue that the victims should not of 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" [2004-2005] 8 *Buffalo Criminal Law Review* 567; Vera Bergelson, "Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law," [2004-2005] 8 *Buffalo Criminal Law Review* 385.

[78] Ruth Gavison, "Privacy and the Limits of Law," (1980) 89(3) *Yale Law Journal* 421, p 428.

information about *X*, no one pays attention to *X*, and no one has physical access to *X*".[79] A loss of privacy can result when people obtain information about another, or pay attention to her, or gain access to her.[80] These elements of secrecy, anonymity, and solitude[81] 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 uses of her senses.[82]

Gavison[83] provides a number of examples to demonstrate how certain privacy losses can be understood in terms of physical access. For example, 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 of these 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".[84] 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.

---

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Id. p 433.
[83] Ibid.
[84] Ibid.

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, I am of the view that 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 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 privacy 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.[85] 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.[86]

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 he or 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

[85] I 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 & Ors. V. Hello! Ltd. & Ors.* [2003] EWHC 786.

[86] *Newspapers Ltd v. HRH Prince of Wales* [2006] EWCA Civ 1776 (21 December 2006).

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.[87] Where a celebrity accidentally or recklessly exposes her posterior in public, then she could hardly complain about a loss of privacy.[88]

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 Benn[89] argues that such offence doing is wrongful because it treats its victim with a lack of respect as a person. He also connects the wrongfulness of this type offence doing up 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.[90] 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".[91]

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.[92] 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

---

[87] See *Ettinghausen v. ACP* (1993) A. Def. R. [51,065] (SC (N.S.W.) 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," Story from BBC NEWS: http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/5294806.stm, Published: 2006/08/29 10:34:25 GMT.
[88] See Robert Stansfield, "Britney's VPL," (London: *The Daily Mirror*, published 4/12/2006), 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 (Cap 200)*. See *HKSAR v. Ho Wong-Cheong* (unrep. HCMA No. 397 of 1997).
[89] Stanley I. Benn, *A Theory of Freedom*, (Cambridge: Cambridge University Press, 1988), p 275.
[90] Ibid.
[91] Ibid.
[92] Ibid.

that they are in control of their private world, act even more "intriguingly for [their] manipulator's ends";. Benn[93] 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 distress[94] would not be enough to set back their interests, but the loss of privacy and anonymity would cause profound offence and resentment. This type of wrongdoing is criminalisable not because it causes offence, but because it results in a wrongful privacy loss. The privacy loss is an independent objective element, which can be used to give the legislature guidance and justification for invoking the criminal law.

I want widen my inquiry even further to deal with exhibitionism, as any law reform in this area needs to consider the wider issues. In doing this, I 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's[95] 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 through 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.[96] Goffman[97] notes that wrongful encroachments can come about

---

[93] Ibid.

[94] 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": ibid p 46. 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.

[95] Feinberg, Vol. II, n 29 above, pp 10-13.

[96] Gavison 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

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".[98] Goffman cites unwanted and obtrusive loudness as an example. Goffman provides a discussion of personal spheres in public places. In his comprehensive work, *The Territories of the Self*,[99] 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".[100] Territories are not determined by objective factors, but rather the determiners 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".[101]

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."[102] The contours of personal space are generally determined according to norms,[103] 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 discomfiture.[104] 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

---

sights…insulting, harassing, or persecuting behaviour, presenting people in a 'false light'; unsolicited mail and unwanted phone calls" and so on: Gavison, n 78 above, p 436.

97 Erving Goffman, *Relations in Public, Microstudies of Public Order*, (New York: Basic Books, 1971), pp 50-51.

98 Ibid p 51.

99 Ibid p 29.

100 Ibid.

101 Ibid p 31.

102 Ibid pp 31-33.

103 Ibid.

104 Ibid p 31.

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".[105] 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".[106] In this 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[107] 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.

It is arguable that objective privacy losses occur when the wrongdoer's information is forced upon non-consenting spectators' in the public domain. The problem with exhibitionism/public nudity is that it is about being included in the domain of others. 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

[105] Ibid.
[106] Ibid p 60-64.
[107] Von Hirsch and Simester, n 38 above, p 122.

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.

Feinberg[108] argues that: "In being made 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 exhibitionism, 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 let 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.[109] It should also be noted, that to the extent, that people claim that 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. Why? Not merely because this kind of information is not obscene, indecent, or otherwise intimate, but because this kind of conduct does not violate their right to be let alone. Feinberg cites its reasonableness of such offensive displays,[110] as a reason for toleration, but the better justification for tolerating such conduct is that it is not wrongful. It is no more wrongful for an interracial or lesbian couple to appear in public than it is for Anglo-Saxon heterosexual couples.[111]

---

[108] Feinberg, Vol. II, n 29 above, p 23.

[109] In 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, n 55 above, p 214.

[110] Feinberg, Vol. II. n 29 above, p 26.

[111] This conclusion is based on the objective moral principles of *equality* and human dignity. All humans are equal and are worthy of equal respect. The offended party does not have a greater right 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 the offended person's racism or homophobia that is wrongful, because this type of offence treats minorities as less than full members of the community. See generally Dworkin, n 26 above, p 198.

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 from 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 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 a wrongful and extraordinary grave loss of privacy. Thus, it is on this basis, that Mr. Chung Yik-tin could have been legitimately prosecuted. The focus should have been on privacy and consent, not on whether the material was obscene or indecent, because publishing and circulating even indecent and obscene photos of others without their consent is wrongful and criminalisable. New is needed to address the privacy and consent issues, as this will give the prosecution clear guidance as to when it should prosecute. The confusion in the Chung Yik-tin, was caused by the over-emphasis on the seriousness of publishing obscene material. Publishing obscene material is not wrongful or harmful, except for where the publication has been without consent of those displayed in the images.

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. I think any law reform in this area should also address the blanket prohibitions against exhibitionism and so forth. As it is only a matter of time, before a similar controversy arises in this area. Here, I have argued that the conduct is criminalisable because it interferes with the non-consenting receiver's right not to receive 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 gaol terms would be disproportionate and unjust.[112]

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.[113] A person cannot be harmed or offended if she consents to seeing such material. Likewise, a woman is not harmed by sexual intercourse if she consents, but if consent is absent she is harmed in a grave way. 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. A narrowly tailored piece of legislation is needed to tackle privacy violations and other forms of harmful offence.

[112] Von Hirsch and Ashworth, n 38 above.
[113] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (London: Smith, Elder, & Co., 1873).