

CRIMINALISATION: APPLYING A LIVING-STANDARD ANALYSIS TO NON-CONSENSUAL PHOTOGRAPHY AND DISTRIBUTION

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Determining whether conduct should be criminalised or not, is a serious problem because the criminal law is becoming more civilised. This article explores the living-standard analysis tool, which provides a systematic decision-making framework rather than leaving it to intuition. This tool is applied to four examples of non-consensual photography and distribution, and the results are compared with the criminal law. This comparison indicates that the two do not always coincide. Over-criminalisation is one possible explanation for this discrepancy. This article recommends further research into the usefulness of the living-standard analysis tool.

I INTRODUCTION

Determining the boundaries of criminal law is a serious problem. There is a trend of criminal law encroaching upon conduct that was ‘previously thought to be civil or regulatory in character’.¹ The criminal law has been described as a ‘predominantly administrative system managing enormous numbers of relatively non-serious and “regulatory offences”’.² Most commentators suggest that there is no unifying factor that underpins the decision to criminalise conduct. For example, Simester and Sullivan conclude that ‘the sheer variety of conduct that has been designated a criminal wrong defies reduction to any “essential” minimum’.³ Similarly, Findlay, Odgers and Yeo say

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¹ J C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875.

² L Farmer, 'The Obsession with Definition' (1996) 5 *Social and Legal Studies* 57, 64-6.

³ A P Simester and G R Sullivan, *Criminal Law Theory and Doctrine* (Hart, 2nd ed, 2003) 3. Further, McSherry and Naylor contend that: ‘the limits of the criminal law cannot be set by reference to a “simple principle”, be it harm, individual liberty or whatever. Instead the boundaries of the law are shaped by a variety of forces that operate as broad guidelines rather than its clear-cut criteria’: B McSherry and B Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004) 22.

that there is no simple explanation about why the criminal law has pursued one direction and not another.⁴ Further, Ashworth suggests that the criminal law is ‘unprincipled and chaotic’ and questions whether the criminal law is a ‘lost cause’.⁵ Arguably, the development of criminal law has been unpredictable because of a ‘fundamental ambiguity of its central organising principles’.⁶ Several policies or principles may be selected during a value laden selection process to justify criminalisation.⁷ In any event, the boundaries of criminal law are based on rationality and justice and not merely chance or contingency.⁸

Whether non-consensual photography and distribution falls within the boundaries of criminal law is a live issue. In this article I have chosen non-consensual photography and distribution over other examples of criminal conduct because it is topical in the 21st century.⁹ Many jurisdictions have provided a legislative response to this conduct in the 21st century.¹⁰ Further, recent media reports (some of which are discussed below) are littered with examples of this conduct, and it has been said that the community is outraged by such conduct.¹¹ While non-consensual photography is not a new phenomenon, the means of photographing and distributing such photographs have become more sophisticated with the advent of digital cameras,¹² mobile phone cameras, video cameras, web cams and the Internet. To determine whether these examples of non-consensual photography and distribution should be criminalised, this article will apply a living-standard analysis.

von Hirsch and Jareborg created the living-standard analysis tool, which gauged the seriousness of criminal harm.¹³ Their approach is normative because it indicates how offences ‘should’ be rated.¹⁴ They restricted themselves to conduct that was already

⁴ M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (Oxford University Press, 3rd ed, 2005) 12.

⁵ A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *The Law Quarterly Review* 225, 225.

⁶ Ibid.

⁷ Findlay, Odgers and Yeo, above n 4, 12.

⁸ Ibid.

⁹ As mentioned below, the living-standard analysis tool does not apply to victimless crimes. It only applies where the victim is identifiable. Thus, this article will consider examples of non-consensual photography and distribution where the victim is identifiable.

¹⁰ For example see *Crimes Act 1961* (NZ) s 216G-N, which came into effect in December 2006; *Criminal Code* (Qld) s 227A-C, which came into effect in December 2005; *Criminal Code* (Can) s 162, which came into effect in November 2005; *Sexual Offences Act 2003* (UK) s 67, which came into effect in May 2004; and *Summary Offences Act 1988* (NSW) s 21G-H, which came into effect in March 2004.

¹¹ Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) 9 <<http://www.ag.gov.au>> at 1 October 2005.

¹² There is a trend to embed small cameras in everyday objects, for example, teddy bears, clocks, smoke detectors, exit signs and pens: C Calvert and J Brown, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469, 480.

¹³ A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1. See also M Treip, 'Re-Thinking the Study of Criminal Law?' (1992) 55 *The Modern Law Review* 733. The definition of ‘living standard’ used in this work is much broader than that used by economists. It refers to ‘the degree of economic affluence or want...[and] non-economic capabilities that affect personal well-being’: A von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 7.

¹⁴ von Hirsch and Jareborg, above n 13, 6.

criminalised, for example, homicide, assault, battery, petty assault, armed robbery, forcible rape, date rape, burglary with ransacking, common residential burglary and auto theft because they were interested in sentencing policy.¹⁵ However, they recognised that the living-standard analysis could be employed to determine whether conduct should be criminalised.¹⁶ None of the literature attempts to apply the living-standard analysis tool to determine whether conduct should be criminalised. Thus, in this article I will fill a gap in the literature by applying the living-standard analysis tool to determine whether non-consensual photography and distribution should be criminalised or not.

In this article I will conclude with a comparison between the results of the living-standard analysis tool and the black letter law pertaining to non-consensual photography and distribution.

II EXAMPLES OF NON-CONSENSUAL PHOTOGRAPHY AND DISTRIBUTION

Non-consensual photography and distribution is not a new phenomenon. In 1890, Warren and Brandeis anticipated the need to protect privacy from people that make surreptitious and instantaneous photographs.¹⁷ More explicitly, the literature approximately 100 years later discusses an incident where a female, who was leaving a funhouse with her two children, was photographed when an air jet unexpectedly blew her skirt up in the air, such that her underwear was visible in the photograph.¹⁸ The photographer published the photograph on the front page of a newspaper. As a result of this, the female was ‘embarrassed, self-conscious, upset...was known to cry on occasions’¹⁹ and brought an action on the basis that her privacy had been invaded. The Alabama Supreme Court concluded that the female had a reasonable expectation of privacy in the circumstances because the intrusion was indecent, vulgar, embarrassing and without the female’s volition.²⁰ This incident occurred in the 1960s, but numerous incidents of non-consensual photography and distribution have been reported beyond 2000.

The Australian Standing Committee of Attorneys-General highlights several prominent instances of photographing and distributing non-consensual photographs in its Discussion Paper.²¹ One of these instances involved photographing children at South Bank Parklands in Brisbane without the knowledge or permission of their parents.²²

¹⁵ von Hirsch and Jareborg, above n 13, 3 and 24-8.

¹⁶ Ibid.

¹⁷ S Warren and L Brandeis, 'The Right to Privacy' (1890) IV *Harvard Law Review* 193, 195 and 211.

¹⁸ A McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *North Carolina Law Review* 989, 1045; L Rothenberg, 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space' (1999-2000) 49 *American University Law Review* 1127, 1148; and Calvert and Brown, above n 12, 490.

¹⁹ Calvert and Brown, above n 12, 490.

²⁰ *Daily Times Democrat v Graham* 276 Ala 380 (1964). Note that this is a civil case and not a criminal case.

²¹ Standing Committee of Attorneys-General, above n 11, 5-6.

²² Ibid. See further: 'Parents Warned over Online Beach Photos', *The Age* (Melbourne), 27 January 2005.

When the children were covertly photographed, they were dressed in swimmers and playing in a public park. The images were brought to the media's attention when they were uploaded on a website. The website had no links to pornography or paedophilia, but the author of the website removed the website after media exposure. At the time of the incident, the conduct was not criminalised in Queensland, but the media claimed the community was outraged by such conduct.²³ However, the media did not support their claim with any evidence, especially not empirical evidence. Further instances discussed in the Australian Standing Committee of Attorneys-General Discussion Paper include covertly photographing Melbourne school boys dressed in half of their rowing suits,²⁴ and a 16 year old surf lifesaver.²⁵ Similar instances have occurred outside Australia, for example, in New Zealand, a man filmed school girls walking along a public street, through a gap in a curtain in a bus parked on a public street.²⁶ In these examples, there was no pre-existing relationship between the person taking the photograph and the subject. Further, although the subjects in these instances were children, children are not the only subjects of non-consensual photographs.

Several incidents of covert filming targeted females doing every day activities in places that may be accessed by the public. For example, photographing topless female bathers at a public beach,²⁷ photographing up the skirts of females while they are in shopping malls,²⁸ and covertly photographing a female dressed in outer clothing sitting on a step outside a Canadian building and subsequently publishing it in a magazine.²⁹ In contrast to these instances involving places accessible by the public, other instances have involved more private settings and more embarrassing circumstances. In particular, the 2004 New Zealand Law Commission Study Paper highlights incidents such as covertly filming teenage girls undressing in their bedroom, filming boys undressing using a hand-held camera behind a one-way window, installing a camera in a dressing room to film female performers, filming a woman trying on a swimsuit at a market changing

²³ Standing Committee of Attorneys-General, above n 11, 12.

²⁴ Ibid 5. See further: 'Vic-Police Powerless to Act on Gay Website Containing Schoolboys', *Australian Associated Press* (Australia), 22 February 2002.

²⁵ Standing Committee of Attorneys-General, above n 11, 5.

²⁶ New Zealand Law Commission, *Intimate Covert Filming Study Paper* (2004) 41 <<http://www.lawcom.govt.nz>> at 6 January 2006; *Police v R* (20 February 2004) District Court Dunedin, (Judge O'Driscoll). *Hosking v Runting* [2004] NZCA 34 is an analogous New Zealand case, which involved covertly photographing and publishing the photographs in a magazine of a celebrity's children wearing outer clothing in a public place.

²⁷ Standing Committee of Attorneys-General, above n 11, 19. See further: K Burton, 'Erosion at the Beach: Privacy Rights Not Just Sand' (2006) 11 *Privacy Law and Policy Reporter* 216; 'Topless Photos Prove Costly', *Herald Sun* (Sydney), 2 December 2004; 'Parents Warned Over Online Beach Photos', above n 22.

²⁸ Standing Committee of Attorneys-General, above n 11, 19. See further: 'Victorian Charged Over Indecent Schoolies Photos' (2006) *ABC News Online* (Australia), 22 November 2006; 'Schoolies Urged to Look out for Peers', *Courier-Mail* (Gold Coast), 20 November 2006; *Teacher Refused Bail in 'Upskirt' Case* (2007) News Limited <<http://www.news.com.au>> at 12 May 2007; Jessica Marszalek, 'Peeping Tom, Thieves Target Schoolies', *The Australian* (Gold Coast), 21 November 2006; 'Second Man Held Over Snaps of Women at Tennis', *Sydney Morning Herald* (Sydney), 22 January 2007; *Tram Voyeur 'Filmed Up Skirts'* (2007) News Limited <<http://www.news.com.au/story>> at 9 June 2007; 'Authorities to Ban Photos 'Up Skirts'', *Courier Mail* (Brisbane), 27 May 2007; *Crackdown Planned on Pervert Photos* (2007) News Limited <<http://www.news.com.au/story>> at 9 June 2007.

²⁹ *Aubry v Editions Vice-Versa* [1998] SCR 591. JWL, 'HFX OUT HQQ', *Halifax Chronicle-Herald* (Amherst), 29 September 2006.

booth, filming women using a tanning salon, filming cheerleaders undressing using a video camera behind a two-way mirror and filming females as they used the home bathroom of the person making the visual recording.³⁰ Similar incidents have been reported in Canada, including a man who filmed his female colleagues using a co-ed washroom;³¹ a man who videotaped his consensual sexual activities with a female, but who showed them to his friends at a party without the female's consent;³² and a landlord who installed a video camera in the air vent of a rental apartment tenanted by a female.³³ This last Canadian incident is analogous to incidents in the United Kingdom where landlords fixed spyholes into bathrooms;³⁴ in New South Wales where a man filmed his female flatmates whilst they were showering;³⁵ and in Queensland where a stepfather filmed his adult stepdaughters showering.³⁶ Another intimate example involved a man peeping through a bedroom window and photographing a female while she was sleeping.³⁷ In most of these examples, there was a pre-existing relationship between the person making the non-consensual visual recording and the subject, but this is not always the case.

This article suggests that the key non-consensual photography incidents emerging out of the media reports and the discussion papers involve photographing a child playing in a public park, photographing a topless female bather at a public beach, up-skirt filming at a shopping centre and photographing a housemate as they shower in the bathroom. This article will determine whether these incidents should be criminalised by applying the living-standard analysis tool. The next section of this article outlines the living-standard analysis tool.

III LIVING-STANDARD ANALYSIS TOOL

The von Hirsch-Jareborg living-standard analysis tool has merit because it provides a systematic framework for determining whether conduct should be criminalised or not, rather than making the decision intuitively, impressionistically or 'on the basis of traditional assumptions about the ranking of offences. The von Hirsch-Jareborg

³⁰ New Zealand Law Commission, *Intimate Covert Filming Study Paper* (2004) 2 <<http://www.lawcom.govt.nz>> at 6 January 2006.

³¹ Department of Justice Canada, *Voyeurism as a Criminal Offence: A Consultation Paper* (2002) 1 <<http://canada.justice.gc.ca>> at 6 January 2006. This is similar to an example in Hobart, where a primary school cleaner drilled a hole in the ceiling of a toilet and installed a camera to view female students and teachers using the toilet: Glenn Cordingley, *Cleaner Photographs Kids on Toilet* (2007) News Limited <<http://www.news.com.au/story>> at 11 May 2007.

³² Department of Justice Canada, above n 31, 6.

³³ *Ibid* 1.

³⁴ United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) 12 <<http://www.homeoffice.gov.uk>> at 6 January 2006. Compare Michael A Scarcella, 'Homeowner's Hidden Camera Helps Send Voyeur to Jail', *Sarasota Herald-Tribune* (Manatee County), 14 August 2006; and R Wacks, 'Home Videos: Is the Surveillance of Domestic Helpers Lawful?' (2000) *Privacy Law and Policy Reporter* 49.

³⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 2004 (Ms Angela D'Amore).

³⁶ *R v Davies* [2004] QDC 279. This case is similar to an incident reported by the media, where an ex-policeman filmed two girls showering in his home. The two girls were aged 9 and 14 years old, and the camera was hidden in a towel: *Ex-policeman Filmed Girls in Shower* (2007) News Limited <<http://www.news.com.au>> at 18 May 2007.

³⁷ Rebecca Cavanagh, *Snapped Naked While Sleeping* (2007) News Limited <<http://www.news.com.au/story>> at 9 June 2007.

approach urges one to dig deeper, and to look more closely at the interests affected'.³⁸ Under the von Hirsch-Jareborg schema, there are four generic-interest dimensions that may be affected by a crime, that is, 'physical integrity, material support and amenity, freedom from humiliation, and privacy and autonomy'.³⁹ Physical integrity 'embraces health, safety, and avoidance of physical pain'.⁴⁰ Material support and amenity includes all types of material interests, for example, food, shelter and luxuries.⁴¹ Freedom from humiliation encompasses 'injuries to self-respect that derive from others' mistreatment'.⁴² Privacy and autonomy 'promotes self-respect'⁴³ and helps a person to pursue various preferences.⁴⁴ While the list of generic-interest dimensions appears compelling, a decision-maker should be aware of its weaknesses. It is conceded that one of the weaknesses with the von Hirsch-Jareborg living-standard tool is that the list of generic-interest dimensions is random, incomplete and not based on theory. The list of generic-interest dimensions is based on von Hirsch and Jareborg's impressions of legally protected interests usually involved in victimising crimes.⁴⁵ Despite this weakness, the living-standard analysis tool gives credence to a broad range of interests that may be overlooked had the decision to criminalise conduct been made intuitively.

The next step in the von Hirsch-Jareborg living-standard analysis tool is to estimate the degree to which the living standard of a typical victim would be affected in a typical case.⁴⁶ In this way, they support a 'standard harm' rather than dealing with victims that are particularly vulnerable or resilient.⁴⁷ The living standard does not focus on an 'actual life quality or goal achievement, but on the *means* or *capabilities* for achieving a certain quality of life. It is also standardized, referring to the means and capabilities that would *ordinarily* help one achieve a good life'.⁴⁸ Consequently, the living standard can be employed without knowing a person's focal aims or goals.⁴⁹ Thus, living-standards differ from welfare interests because the former is not based on a choice criterion.⁵⁰ von Hirsch and Jareborg grade an intrusion into a person's living-standard at one of four levels in descending order as set out in the table below.⁵¹ Four levels were chosen because the difference between them was reasonably easy to discern.⁵² A larger number of levels, for example, 100, would have given a deceptive sense of precision.

³⁸ A Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 39.

³⁹ von Hirsch and Jareborg, above n 13, 19.

⁴⁰ Ibid 20.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid 19-20.

⁴⁶ Ibid 21.

⁴⁷ Ibid 4. In these cases, principles of aggravation and mitigation would be relevant.

⁴⁸ Ibid 10.

⁴⁹ Ibid 10-11.

⁵⁰ Ibid 11.

⁵¹ Ibid 17.

⁵² Ibid.

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

The terms ‘subsistence’, ‘minimal well-being’, ‘adequate well-being’ and ‘enhanced well-being’ emerge in the table above and are worthy of further exploration. ‘Subsistence’ ‘means barely getting by. Included would be preservation of one’s major physical and cognitive functions, and preservation of a minimal capacity for social functioning.’⁵³ ‘Minimal well-being’ provides a ‘minimum level of comfort and dignity’.⁵⁴ While ‘minimal well-being’ offers a better standard of life than ‘subsistence’, it is still substandard. ‘Adequate well-being’ refers to a level of comfort and dignity that is ‘not leading a substandard or deprived existence’.⁵⁵ Finally, ‘enhanced well-being’, is above an ‘adequate well-being’ and ‘addresses those concerns that improves someone’s quality-of-life significantly’.⁵⁶ Consequently, the quality-of-life improves from levels 1 ° to 4 °.

Whether a level 1 ° to 4 ° is attributed to the conduct, depends on the temporal perspective taken. von Hirsch and Jareborg adopt a one-year or slightly longer temporal perspective.⁵⁷ This means that the relevant question in assessing the conduct is ‘How has your year been?’⁵⁸ rather than ‘How was your day?’⁵⁹ or ‘How was your last decade?’.⁶⁰ It is asserted that these latter two expressions overrate or underrate the conduct.

To link the levels in the table above with the generic-interest dimensions identified above, von Hirsch and Jareborg assert that physical integrity and material support and amenity may relate to all four levels in the table above.⁶¹ In contrast, freedom from humiliation, and privacy and autonomy develop at levels 2 ° to 4 ° in the table above.⁶² The reason for this is that level 1 ° relates to survival, and a person may survive without privacy or humiliation.⁶³ After determining the relevant level in the table above, the

⁵³ Ibid 18.

⁵⁴ Ibid.

⁵⁵ Ibid 19.

⁵⁶ Ibid.

⁵⁷ Ibid 22.

⁵⁸ Ibid.

⁵⁹ Ibid 21.

⁶⁰ Ibid 22.

⁶¹ Ibid 21.

⁶² Ibid.

⁶³ Ibid 18.

next step is to map the level onto a harm gradation scale.⁶⁴ The von Hirsch and Jareborg harm gradation table is set out below.⁶⁵

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

von Hirsch and Jareborg acknowledge that their living-standard analysis tool is not precise and requires judgment.⁶⁶ They retreat on the issue of criminalisation by asserting that if a type of conduct constitutes grave harmfulness on the harm gradation table above, it ‘does not necessarily settle whether it should be proscribed’.⁶⁷ In addition to considering harmfulness, they recommend that the legislature consider other factors in making the decision to criminalise conduct, for example, the social value of the conduct, the ability to enforce the criminal law and the impact the prohibition has on individual autonomy and privacy.⁶⁸ They do not explore these factors and focus their discussion on harmfulness. Similarly, in this article I will concentrate on the living-standard analysis tool, and thus harmfulness. A discussion of these other factors is beyond the scope of this article. The living-standard analysis tool provides a systematic conceptual framework for gauging criminal harm rather than leaving it to guesswork.⁶⁹ Ashworth described the living-standard analysis tool as ‘pathbreaking’.⁷⁰ While the living-standard analysis tool has not been applied in later sentencing literature or applied in making the decision to criminalise conduct, this article will fill this gap. In particular, in this article I will proceed to apply the living-standard analysis tool to four examples of non-consensual photography and distribution to determine whether the examples should be criminalised.

IV APPLICATION OF THE LIVING-STANDARD ANALYSIS TOOL TO EXAMPLES OF NON-CONSENSUAL PHOTOGRAPHY AND DISTRIBUTION

In this article I will apply the living-standard analysis tool to four examples of non-consensual photography. The four examples are: (1) photographing a child playing in a public park; (2) photographing a topless female bather at a public beach; (3) up-skirt filming at a shopping centre; and (4) photographing a housemate as they shower in the bathroom. I argue that, intuitively, photographing a housemate as they shower in the bathroom and up-skirt filming at a shopping centre, involve a greater intrusion on privacy⁷¹ (and thus more harm and a greater impact on a person’s living standard) than photographing a child playing in a public park or photographing a topless female bather at a public beach. Consequently, my intuition suggests that if any of these examples

⁶⁴ Ibid 29.

⁶⁵ Ibid.

⁶⁶ Ibid 38.

⁶⁷ Ibid 4.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ashworth, above n 38, 37.

⁷¹ See Rothenberg, above n 18; Calvert and Brown, above n 12; and McClurg, above n 18.

should be criminalised, it should be photographing a housemate as they shower in the bathroom and up-skirt filming at a shopping centre. In any event, the living-standard analysis tool is more sophisticated than merely my intuition and it will be applied to each of these four examples.

In the first example of photographing a child playing in a public park, the relevant interest dimensions are freedom from humiliation, and privacy and autonomy. This article focuses on examples of non-consensual photography and this example assumes that the child and their parents (or guardian) do not expressly consent to the photography. It also assumes that child has not impliedly consented to the photography merely because they are in a public place. The living-standard analysis tool does not distinguish child victims from adult victims. Physical integrity is not relevant in this example from a one year temporal perspective. Note that this conclusion on physical integrity does not cover other types of conduct that may follow on from taking a photograph of a child, for example, kidnapping, torture, sexual assault or rape. This conclusion on physical integrity in this example is consistent with von Hirsch and Jareborg's example of assault. More specifically, they assert that in an assault where the victim sustained substantial bruises and lacerations, but did not require hospitalisation, level 4 ° may not be justified from a one-year temporal perspective.⁷² Further, taking a photograph of a child playing in a public park does not involve material interests and thus the material support and amenity interest dimension is not relevant. The freedom from humiliation and the privacy and autonomy interest dimensions in this example involve level 4 ° because a child's living-standard is not affected, from a one-year temporal perspective, if they had their photograph taken in a public place. This conclusion on the freedom from humiliation interest dimension in this example is consistent with von Hirsch and Jareborg's conclusion on forced rape and date rape, which involved level 2 ° because it is the norm in our culture that sexual acts are done with consent.⁷³ Further, the conclusion in this example on privacy and autonomy is consistent with von Hirsch and Jareborg's level 4 ° attributed to a residential burglary where the home is not significantly disturbed⁷⁴ and level 2 ° to a residential burglary with ransacking.⁷⁵ Taking a photograph of a child in a public place involves a lesser intrusion on privacy than an intrusion in a private place, such as a home, and thus the level attributed to this example cannot be more than level 4 °. In summary, the living-standard analysis tool indicates that photographing a child playing in a public park results in an intrusion affecting enhanced well-being, that is, level 4 °.

The same conclusion will be reached with respect to the second example, which is photographing a topless female bather at a public beach. The living-standard analysis tool does not distinguish victims on the basis of gender. Similarly, to the child photograph discussed above, this example of the topless female bather assumes that the female has not expressly consented to the photography or impliedly consented merely because she was in a public place. For the same reasons as the example above, the physical integrity and the material support and amenity interest dimension are irrelevant. Note that the conclusion on physical integrity does not canvass further conduct, where the photographer may stalk, sexually assault or rape the topless female

⁷² von Hirsch and Jareborg, above n 13, 24.

⁷³ Ibid 26.

⁷⁴ Ibid 27.

⁷⁵ Ibid.

bather. Photographing a topless female bather in a public place involves a lesser intrusion on privacy than the home invasions provided by von Hirsch and Jareborg, and mentioned above. Consequently, level 4 ° should be attributed to privacy and autonomy. A couple of arguments could be made with regard to humiliation. One argument is that if a female chooses to bath topless at a public beach, she would not be humiliated by another person observing or photographing her. An alternative argument is that the topless female bather is content for surrounding people to observe her, but may not be content with the surrounding people making a permanent record of her in that state. In any event, it is plausible that taking a photograph of a topless female bather at a public beach will only affect the female's enhanced well-being and thus be a level 4 °.

The third example considered in this article is up-skirt filming at a shopping centre. As the living-standard analysis tool only applies to conduct where there is an identifiable victim,⁷⁶ this article assumes that the subject of the up-skirt filming is identifiable. This is possible when the subject has a 'distinguishing tattoo, piercing or birthmark'.⁷⁷ For the same reasons as discussed in examples one and two, the physical integrity and material support and amenity interest dimensions are irrelevant. The privacy and autonomy and the humiliation interests dimension are rated at level 4 ° as the photography intrusion has affected the subject's enhanced well-being. Attributing a level 1 °, 2 ° or 3 ° to up-skirt filming in a shopping centre is implausible considering that the living-standard analysis tool is used from a one-year temporal perspective.

The fourth and final example involves photographing a housemate showering in the bathroom. In this example, the housemate has not been made homeless and they have not lost any material possessions. Thus, material support and amenity is not affected. Similarly, physical integrity is not affected, provided that the photographer merely wants to photograph the housemate showering and does not attempt to engage in sexual assault or rape. This example intrudes on privacy and autonomy. Arguably, it is more intrusive than three examples above because it occurs in a home. The photographer has entered a space in the house (bathroom) uninvited and an analogy may be made with a burglar who enters a house uninvited. As mentioned above, von Hirsch and Jareborg rated the intrusion on privacy and autonomy in a residential burglary with no ransacking at level 4 °. Similarly, the privacy and autonomy intrusion in this example is level 4 °. With regard to humiliation, this example is more humiliating than examples one and two above, but arguably equal to example three, which also involves an intrusion into private body parts, albeit that example three occurs in a shopping centre (public place) and example four occurs in a home bathroom (private place). Once again, the one-year temporal perspective would not justify a level 1 °, 2 ° or 3 ° for humiliation in this example. As mentioned above, von Hirsch and Jareborg attributed level 2 ° to humiliation for forced rape and date rape. Thus, it seems reasonable to award a much lower level, for example, level 4 ° to a person who photographs their housemate showering.

Arguably, a higher level of harm would occur if the photographer in the four examples above went further than merely taking the photograph, and distributed it on the Internet

⁷⁶ von Hirsch and Jareborg, above n 13, 3.

⁷⁷ Q Burrows, 'Scowl because you're on Candid Camera: Privacy and Video Surveillance' (1997) 31 *Valparaiso University Law Review* 1079, 1125.

to a world wide audience. In such a case, the rating for freedom from humiliation, and the privacy and autonomy interest dimensions may increase from level 4 ° to level 3 ° or 2 °. As mentioned above, the freedom from humiliation, and privacy and autonomy interest dimensions cannot be rated at 1 °. These additional levels (level 3 ° or 2 °) include upper-intermediate and serious harm on the harm gradation table. However, given that the distribution on the Internet is judged from a one-year temporal perspective, a lower level is more appropriate.

As discussed above, the living-standard analysis tool rated all four examples of non-consensual photography at level 4 °. Presumably, it grouped the different types of non-consensual photography together, because the tool was designed to deal with a range of offences, for example, homicide, armed robbery, burglary and date rape etc. Thus, the living-standard analysis tool results did not match my intuition as set out above. In particular, I speculated that the last two examples (up-skirt filming at a shopping centre and photographing a housemate as they shower in the bathroom) involved a greater intrusion into a person's living-standard. A level 4 ° may be transferred to the harm gradation table at either IV or V, which represent lower-intermediate or lesser harms. von Hirsch and Jareborg did not indicate the point on the continuum (level 1 ° to 4 °) at which criminalisation of the conduct would be necessary. Arguably, where the conduct impacts on subsistence and results in grave harm, there is a stronger basis for criminalising the conduct than where the conduct only marginally impacts on a person's living-standard and results in a lesser harm. Consequently, the application of the living-standard analysis tool concludes that each of the four photography examples are at the lowest point on the continuum, that is, level 4 °. If a dividing line was drawn across the four levels to separate conduct that should be criminalised from conduct that should not be criminalised, the four examples explored in this article are more likely to fall on the side of the dividing line where conduct should not be criminalised because they fall within level 4 °. In such a case, the living-standard analysis would not support the criminalisation of these four examples of non-consensual photography and the following discussion will proceed on this basis.

V COMPARING THE RESULTS OF THE LIVING-STANDARD ANALYSIS TOOL WITH THE CRIMINAL LAW

The results from the living-standard analysis tool with respect to the four examples of non-consensual photography above will be compared to the criminal laws in Queensland, New South Wales, New Zealand and Canada. Four jurisdictions have been chosen to determine whether there is a pattern in the way the four examples of non-consensual photography are treated by the criminal law. In relation to the first example, that is, photographing a child playing in a public park, it is not criminalised in Queensland, New South Wales, New Zealand or Canada.⁷⁸ Additionally, the second example of photographing a topless female bather at a public beach is not criminalised in any of the four jurisdictions.⁷⁹ For completeness, if the photograph of the child playing in a public park or the photograph of the topless female bather were distributed through the Internet, it would not be an offence in these four jurisdictions. As the first two examples of non-consensual photography are not criminalised in the four

⁷⁸ Refer generally to the offences in *Criminal Code* (Qld); *Summary Offences Act 1988* (NSW); *Crimes Act 1961* (NZ); and the *Criminal Code* (Can).

⁷⁹ See the comment in the previous footnote.

jurisdictions, it follows that the criminal law (or lack of) is consistent with the results of the living-standard analysis tool, which indicated that the first two examples should not be criminalised.

The criminalisation of the third and fourth example of non-consensual photography is more controversial. As discussed above, the living-standard analysis tool suggested that up-skirt filming should not be criminalised. This result is consistent with the criminal law position in New South Wales and Canada, which do not criminalise non-consensual up-skirt filming or the distribution of up-skirt filming images on the Internet.⁸⁰ However, non-consensual up-skirt filming is criminalised in Queensland and New Zealand.⁸¹ Further, the distribution of up-skirt filming images on the Internet is criminalised in Queensland and New Zealand.⁸² This means that the results of the living-standard analysis tool for up-skirt filming are not consistent with the criminal law position in Queensland and New Zealand. With regard to up-skirt filming, the comparison between the living-standard analysis tool and the black letter criminal law could illustrate that (a) New South Wales and Canada have interpreted up-skirt filming in a similar fashion to the living-standard analysis tool, (b) Queensland and New Zealand have over-criminalised with respect to up-skirt filming, (c) drawing a line across the four levels in the living-standard analysis tool and concluding that if the conduct falls within level 4, it should not be criminalised, is flawed or (d) if it could be demonstrated that some types of conduct that fall within level 4 should be criminalised, it could follow that New South Wales and Canada have under-criminalised with respect to up-skirt filming. Similarly to example three, an inconsistency arises with respect to non-consensual photography example four, which is photographing a housemate as they shower in the bathroom. As discussed above, the living-standard analysis tool suggested that this example should not be criminalised. In contrast, Queensland, New South Wales, New Zealand and Canada criminalise this example of photography.⁸³ All of these jurisdictions, barring New South Wales, also criminalise the distribution of such photographs.⁸⁴ Once again, the inconsistency between the criminal law and the results of the living-standard analysis tool may be explained by reasons similar to (a), (b), (c) or (d) above.

VI CONCLUSION

Determining the boundaries of criminal law is a serious issue in an environment where criminal law is becoming more civilised. The living-standard analysis tool provides a systematic framework for determining whether conduct should be criminalised or not, rather than leaving the decision to guesswork and intuition.

The first two examples of non-consensual photography used in this article, that is, photographing a child playing in a public park and photographing a topless female bather, demonstrated consistent results between the criminal law in Queensland, New

⁸⁰ See generally the *Summary Offences Act 1988* (NSW); and the *Crimes Act 1961* (NZ).

⁸¹ *Criminal Code* (Qld) s 227A(2); and *Crimes Act 1961* (NZ) s 216G(1)(b)(i).

⁸² *Criminal Code* (Qld) s 227B(1); and *Crimes Act 1961* (NZ) s 216J.

⁸³ *Criminal Code* (Qld) s 227A(1)(b)(ii); *Summary Offences Act 1988* (NSW) s 21G(1); *Crimes Act 1961* (NZ) s 216G(1)(a)(iii); and *Criminal Code* (Can) s 162(1)(b).

⁸⁴ *Criminal Code* (Qld) s 227B(1); *Crimes Act 1961* (NZ) s 216J(1); and *Criminal Code* (Can) s 162(4). See the *Summary Offences Act 1988* (NSW) generally.

South Wales, New Zealand and Canada, and the living-standard analysis tool (drawing a line across at level 4). Both the criminal law and the living-standard analysis tool concluded that these two examples of non-consensual photography should not be criminalised. The outcome that can be drawn from these two examples of non-consensual photography is that the living-standard analysis tool offers an explanation of what should not be criminalised, which has been applied universally in these four jurisdictions.

The third example of non-consensual photography, that is, up-skirt filming, casts doubt on the living-standard analysis tool at an explanatory level. Drawing a line across the living-standard analysis tool at level 4 ° suggested that up-skirt filming should not be criminalised. This is consistent with the criminal law position in New South Wales and Canada, but inconsistent with the position in Queensland and New Zealand. In this article I put forward several possible explanations for the difference between the results of drawing a line across the living-standard analysis tool at level 4 ° and the criminal law. These are (a) some jurisdictions and the living-standard analysis tool have interpreted the conduct similarly, (b) some jurisdictions have over-criminalised the conduct, (c) drawing a line across the four levels in the living-standard analysis tool and concluding that if the conduct falls within level 4 °, it should not be criminalised, is flawed or (d) if it could be demonstrated that some types of conduct that fall within level 4 ° should be criminalised, it could follow that some jurisdictions have under-criminalised the conduct. Future research on criminalisation may benefit from a closer examination of where to draw the dividing line across the four levels to determine whether conduct should be criminalised or not. Further, if it is determined that some types of conduct falling into level 4 ° should be criminalised, while other types should not, criteria for separating these two categories needs to be developed. Consequently, the third example of non-consensual photography demonstrates that living-standard analysis tool offers an explanation of what should not be criminalised, which has been applied by some jurisdictions.

The fourth example of non-consensual photography of photographing a housemate showering in the bathroom, also demonstrated inconsistent results between the living-standard analysis tool and the criminal law. In particular, drawing a line across the living-standard analysis tool at level 4 ° concluded that photographing a housemate showering in the bathroom should not be criminalised. However, it is criminalised in all four jurisdictions. This means that the living-standard analysis tool offers an explanation of what should not be criminalised, which was exceeded by the criminal law in all four jurisdictions. Consequently, the living-standard analysis tool may be viewed ‘neither as ideal nor as explanation but rather as an ideological framework in terms of which policy debate about criminal law is expressed’.⁸⁵ As an ‘ideological framework’,⁸⁶ it facilitates legislative decision making in a criminal law context.

⁸⁵ N Lacey, C Wells and O Quick, *Reconstructing Criminal Law Text and Materials, Law in Context* (Sweet & Maxwell, 3rd ed, 2003) 9. Note that this quote was originally used in the context of the harm principle rather than in the context of the living-standard analysis tool.

⁸⁶ Ibid.