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TAMING THE UNRULY CRIMINAL LAW: WHERE DO YOU DRAW THE BOUNDARIES OF CRIMINAL CONDUCT?

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Criminal law is extending its boundaries to capture conduct that was previously described as civil or regulatory in nature. For example, in some jurisdictions public nuisance, trespass, throwing things at a sporting match, photographing people in private places without their consent and BASE jumping from a building, are criminalised. The unruly nature of criminal law is a serious problem for law makers who need to know what conduct should be criminalised and what conduct should not be criminalised to inform the scope of future criminal laws. It is also a serious problem for members of the community who need to know the minimum standards of behaviour.

The unruly nature of criminal law has occurred because several principles underpin the decision to criminalise conduct. The unruly nature of criminal law has not occurred because the decision has been based on the toss of a coin. Rather than recommending the shrinking of the criminal law to tame it, this paper explores the principles underpinning the decision to criminalise conduct. Such principles include harm, immorality, community welfare, individual autonomy and the politics of lawmaking. Analysing these principles will result in a greater understanding of the decision to criminalise conduct.

To further understand the unruly nature of criminal law, this paper will contrast criminal wrongdoing from civil wrongdoing from the perspective of the wrongdoing and compensation distinction, public and private distinction, and the essentialist distinction. Making these contrasts will help determine where to draw the boundaries of criminal conduct.

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I INTRODUCTION

The decision to criminalise conduct is multifaceted and justified by a range of “conflicting social, political and historical factors”.[1] Simester and Sullivan conclude that “the sheer variety of conduct that has been designated a criminal wrong defies reduction to any “essential” minimum”.[2] Similarly, Findlay, Odgers and Yeo say that there is no simple explanation about why the criminal law has pursued one direction and not another.[3] However, they maintain that the boundaries of criminal law are based on rationality and justice and not merely chance or contingency.[4] The development of criminal law has been unpredictable because of a “fundamental ambiguity of its central organising principles”.[5] The justification for criminalisation stems from one or more principles selected during a value laden selection process.[6] To understand the unruly nature of criminal law, this paper explores the principles underpinning the decision to criminalise conduct, for example, harm, immorality, community welfare, individual autonomy and the politics of lawmaking. Further, it distinguishes criminal law from civil law by highlighting the wrongdoing and compensation distinction, public and private distinction, and the essentialist distinction. Making these distinctions assists in sharpening the focus of criminal law,[7] and thus understanding the decision to criminalise conduct or not. Despite the unruly nature of criminal law,[8] this paper will show that the decision to criminalise conduct is more principled than the toss of a coin.[9]

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[1] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17. See also Alan Norrie, *Crime, Reason and History* (2001) 8.
[2] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 3.
[3] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 12.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201, 212.
[8] See James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 56.
[9] Contrast Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 184.

II HARM

Several academics and theorists have identified the need for the harm principle to relate to harm to others and not merely harm to the offender (legal paternalism). For example, Ashworth cites John Stuart Mill's harm principle underpinning criminalisation, that is, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against, his [or her] will, is to prevent harm to others".[10] Mill argues that conduct should *only* be criminalised if it causes harm to others. He impliedly rejects criminalisation if it merely protects the offender from harm. Further, the use of the word *only* rejects criminalisation if it is based on any other ground. With regard to harm to others, Mill's view is consistent with the view expressed by Findlay, Odgers and Yeo, that is, that conduct should be criminalised if it injures the rights and interests of other people, that is, harms others.[11] Feinberg is more explicit and accepts harm to others as a justification for criminalisation, but rejects legal paternalism. In particular, Feinberg states, "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor *and* there is probably no other means that is equally effective at no greater cost to other values".[12] Feinberg's principle of harm also suggests that harm to others is only one consideration in the decision to criminalise conduct and opens the path for other considerations.

One of the key issues to be determined in applying the harm to others test is the scope of harm.[13] The flexible core of the notion of harm has made the harm to others test notoriously difficult to apply.[14] There is a positive correlation between the scope of harm and the breadth of criminal laws. However, the reality is that not every type of harm warrants the protection of criminalisation.

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[10] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30.
[11] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.
[12] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 26.
[13] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 10.
[14] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 8.

Mill did not provide a definition of harm when espousing the harm principle, but Feinberg developed one. Feinberg's definition of harm is a "thwarting, setting back, or defeating an interest".[15] When determining the importance of interests, three factors are taken into consideration, that is, vitality, the degree to which they are supported by other interests and inherent morality.[16] The harm principle invokes a balancing of the degree of probability of the harm and gravity of the possible harm compared with the social value of the conduct.[17] A further requirement of harm is that it be wrongful.[18] "One person *wrongs* another when his [or her] indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful in the sense [of a setback to interests]".[19] While Feinberg's definition of harm was a significant contribution to the harm principle, it has been subjected to criticism.

One of the criticisms has been with respect to the ambiguity of the type of interest protected by the harm principle. In particular, Ashworth notes that Feinberg's definition of harm, which focuses on an individual's legitimate interests, does not address the political, cultural or moral nature of the interest setback.[20] Further, McSherry and Naylor conclude that the definition does not canvass wider social, indirect or gendered harms.[21] They question whether "harm" encompasses indirect, potential, psychological or economic harm,[22] without putting forward any arguments or a conclusion on these issues. While direct and physical harms fall within the core of harm, it has nebulous edges. These nebulous edges can be fixed by identifying the interests protected by the harm principle.[23] Making choices about the interests protected is morally loaded and

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[15] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 33.
[16] Ibid 217.
[17] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31. Further, see Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 216.
[18] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 105.
[19] Ibid 34.
[20] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30.
[21] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.
[22] Ibid. Compare Gardner who focuses on the means of harming rather than on the types or degrees of harm: John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502, 515.
[23] Neil MacCormick, *Legal Right and Social Democracy* (1982) 29.

depends on one's commitment to community welfare and individual autonomy.[24] However, this is necessary because if there was no conception of the relevant interests, the harm principle would be vacuous.[25]

Some types of minor harm are not criminalised as they fall outside the scope of harm. For example, Feinberg states that "harm" does not canvass "mere transitory disappointments, minor physical and mental "hurts," and a miscellany of disliked states of mind, including various forms of offendedness, anxiety, and boredom".[26] In contrast, some types of minor harms are criminalised, for example, dropping litter and illegal parking.[27] The criminalisation cut-off point for minor harm depends on whether criminalising the harm causes more harm than it prevents.[28]

Modern criminal law has found several good reasons for regulating minor harms, for example, it is cheap, convenient and quick.[29] Thus, economic considerations and expediency have been used to justify criminalisation, without the need for conduct to reach a specific level of wrongfulness or falling within the category of most anti-social form of behaviour.[30] This modern perspective of the criminal law is aligned with Farmer's description of the criminal law as a "predominantly administrative system managing enormous numbers of relatively non-serious and 'regulatory offences'".[31]

Criminalising minor harms is controversial. For example, it goes against Ashworth's normative claim that criminal law is "society's strongest form of official censure and punishment, should be concerned only with major wrongs, affecting central values and

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[24] Ibid. See also Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 32, and Paul H Robinson, 'The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?' (1994) 5 *Contemporary Legal Issues* 299.
[25] Neil MacCormick, *Legal Right and Social Democracy* (1982) 30.
[26] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 215-216.
[27] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 1.
[28] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 216.
[29] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 524.
[30] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 48. Further see Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999-2000) 90 *The Journal of Criminal Law & Criminology* 109.
[31] L Farmer, 'The Obsession with Definition' (1996) 5 *Social and Legal Studies* 57, 64-66.

causing significant harms".[32] However, Ashworth does not provide any guidance on the scope of the terms "major wrongs", "central values" or "significant harms", or whether they change over time with advances in technology. Further, by criminalising minor harms, the harm principle fails to delineate the boundaries of criminal, quasi-criminal and civil laws.[33] It also weakens the harm principle as a justification for criminalisation. Similarly, the criminal law would be undermined if all conduct that caused harm or had the potential to cause harm was criminalised. For example, the criminal law would be labelled as "drastically over-used".[34] Further, it would "impair the criminal law's nondeterrent functions."[35] Consequently, legislators need to carefully determine the dividing line between what harmful conduct falls within or outside the ambit of criminal law.[36]

Lacey, Wells and Quick assert that the harm principle has a "strong common-sense appeal"[37] and has a "significant place in the public debate about criminal law and its limits".[38] McSherry and Naylor note that the harm principle explains why conduct should not be criminalised, but has difficulty in explaining why conduct should be criminalised.[39] Additionally, Lacey, Wells and Quick "suggest that the harm principle is not only indeterminate at a normative level but also incomplete at an explanatory level.[40] Rather than offering an ideal or explanation, the harm principle offers "an ideological framework in terms of which policy debate about criminal law is expressed."[41]

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[32] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 17.
[33] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.
[34] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.
[35] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1877. Further, Ashworth suggests that unenforceable offences will bring the criminal law into disrepute: Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 34.
[36] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.
[37] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 9.
[38] Ibid.
[39] Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.
[40] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 9.
[41] Ibid. See also Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 19.

Conceptual difficulties are not unique to the harm principle as immorality suffers similarly.

III IMMORALITY

Lord Devlin advocated the eradication of immorality as a justification for criminalising conduct. In particular, Lord Devlin claimed that morality underpinned the "social fabric of society"[42] and immoral behaviour eroded "that fabric and consequently"[43] destabilised society. Lord Devlin asserted that society will disintegrate unless immoral acts are criminalised, but did not provide any empirical evidence to support this.[44] The Oxford Companion to Philosophy suggests that legislative responses to protect public morals prohibit or restrict "acts and practices judged to be damaging to the character and moral well-being of persons who engage in them or who may be induced to engage in them by the bad example of others."[45] Immorality has been criticised for justifying criminalisation for several reasons, including that it is not "pure legal moralism",[46] it is a secondary principle to the harm principle,[47] and the scope of immorality.

The scope of immorality is subject to debate. Under the immorality principle, the criminal law should prohibit behaviour that is immoral according to the norms of a society.[48] It is not confined to the teachings of a particular religion. Ashworth notes that this is realistic in a British context because several religions with differing perspectives are practised in British society.[49] Further, Ashworth contends that morality fluctuates

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[42] As cited in Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.
[43] Ibid. Compare Hamish Stewart, 'Legality and Morality in HLA Hart's Theory of Criminal Law' (1999) 52 *SMU Law Review* 201.
[44] Patrick Devlin, *The Enforcement of Morals* (1965) 8-14.
[45] Ted Honderich (ed), *The Oxford Companion to Philosophy* (New Edition ed, 2005), under enforcement of morals.
[46] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 16.
[47] Ibid 17.
[48] Ibid 20.
[49] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 41. See also David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 91, and Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.

with place and time.[50] Lacey, Wells and Quick agree with Ashworth on this point.[51] Similarly, Simester and Sullivan assert that moral stagnation is unattractive.[52] Further they suggest that "difference, even conflict, between the lives and values of citizens can be a dynamic force for the evolution of a vigorous, thriving, and valuable culture."[53]

Lord Devlin claimed that immorality "could be determined by enquiring into what every right-minded person considered immoral".[54] However, this has been criticised because it is doubted whether a shared immorality can be identified,[55] and if so, it could be used to "discriminate against minority groups".[56] This is similar to an assertion made by Findlay, Odgers and Yeo, who claim that the definition of morality "may well stem from irrational prejudices rather than reasoned moral indignation".[57] They assert that morality is imprecise and rests on "mere feelings of disgust".[58]

Criminalisation on the basis of morality should be used sparingly. This protects freedom of expression,[59] and is consistent with the notion of minimalism and Feinberg's suggestion that criminalisation is supported when it prevents "serious" immorality.[60] The term 'serious' is ambiguous and requires further explanation, if not quantification. Feinberg's conclusion is similar to Bagaric, who recommends "limiting criminal law to breaches of important moral principles."[61] However, Bagaric does not specify where to draw the line between important and unimportant principles, or provide any examples of them. In contrast, Simester and Sullivan recommend a "thick skin" approach to criminalising immoral conduct and recommend that people tolerate incivility on the

[50] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 44.
[51] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.
[52] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 17.
[53] Ibid.
[54] As cited in Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 20.
[55] Ibid.
[56] Ibid 21.
[57] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.
[58] Ibid.
[59] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 18.
[60] Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985) 1.
[61] Ibid 193.

ground of "personal and cultural diversity".[62] This "thick skin" approach is consistent with minimalism.

Bronitt and McSherry recognise that many serious offences have a moral dimension.[63] Lacey, Wells and Quick refer to these offences as "real" crimes.[64] They recognise that the criminal law is a "system of quasi-moral judgment which reflects a society's basic values".[65] Interestingly, Bagaric suggests that morality does not need to underpin every crime to be a valid justification for criminalisation. In particular, Bagaric states that "for moral principles to explain and justify the settled rules of law only a significant portion of the rules need to be consistent with the background moral theory".[66] Bagaric could have strengthened this conclusion by supporting it with evidence, for example, comparing the proportion of criminal offences that are consistent with moral theory against the proportion of criminal offences that are not consistent with moral theory. Further, Bagaric leaves open for interpretation the point at which 'significant portion' is satisfied. Presumably, the point lies between 50 per cent and 100 per cent. Arguably, morality underpins the traditional real crimes, but may not justify the criminalisation of modern offences, which lack an explicit moral dimension and are regulatory in nature.[67]

Bagaric acknowledges the civilisation of criminal law. In particular, he provides some examples of modern criminal offences that are regulatory in nature.[68] They do not protect any recognisable right[69] and are aimed at controlling conduct.[70] Further, "the modern criminal law does not universally promote or enforce any particular conception

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[62] AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2003) 16.
[63] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.
[64] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.
[65] Ibid 4. Further see Nicola Lacey, 'Abstraction in Context' (1994) 14 *Oxford Journal of Legal Studies* 255, 266.
[66] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 187.
[67] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 5.
[68] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 189.
[69] Recognisable rights are established in the *Universal Declaration of Human Rights* (entered into by Australia on 10 February 1948), the *International Covenant on Economic, Social and Cultural Rights* (entered into by Australia on 10 March 1976) and the *International Covenant on Civil and Political Rights* (entered into by Australia on 13 November 1980).
[70] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 189.

of morals".[71] In fact, some wrong conduct is not criminalised.[72] Akin to this, Bagaric notes that some people "may scoff at or belittle others for breaching rules of etiquette, fashion trends or the rules of a sporting contest, we do not condemn people for doing so".[73] On the other hand, some conduct, which is not wrong, is criminalised.[74] Consequently, there appears to be a utilitarian and regulatory aspect to modern criminal law.[75] Bagaric suggested that many offences would be decriminalised if criminal laws only dealt with breaches of important moral principles.[76] This would lead to a massive shift in criminal law. As modern criminal law is becoming more civilised in nature, it is more likely to be based on the promotion of community welfare than the preservation of morality.

IV COMMUNITY WELFARE

Ashworth asserts that criminalisation "may be justified as a mechanism for the preservation of social order",[77] which reduces or avoids "unnecessary hardship and financial cost to the community."[78] Thus, it is a social defence[79] and implies that "there is a public interest in ensuring that such conduct does not happen and that, when it does, there is the possibility of State punishment".[80]

Community welfare interests include "the fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life

[71] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 58.
[72] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 4.
[73] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 187. See also Paul H Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA Law Review* 266, 272.
[74] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 4.
[75] Ibid 4-5.
[76] Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 193.
[77] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 22. See also Michael Kirby, 'Editorial' (2001) 25 *Criminal Law Journal* 181, 181.
[78] Andreas Schloenhardt, *Queensland Criminal Law: Critical Perspectives* (2006) 19.
[79] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 11.
[80] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 2.

plan".[81] These community welfare interests coincide with individual goals such as "life, liberty, property and health".[82] Despite having similar goals, the community welfare principle and the individual autonomy principle goals are derived in a different manner. Under the community welfare approach to criminalisation, the basic interests are determined objectively (based on democratic decision making), and are not determined according to the preferences of each individual.[83]

Marshall and Duff explain why there may be alignment between individual and community welfare goals.

> "A group …[shares] the wrongs done to its individual members, insofar as it defines and identifies itself as a community united by mutual concern, by genuinely shared (as distinct from contingently coincident) values and interests, and by the shared recognition that its members' goods (and their identity) are bound up with their membership of the community. Wrongs done to individual members of the community are then wrongs against the whole community – injuries to a common or shared, not merely to an individual, good".[84]

Consequently, social welfare interests and individual goals may unite.

Conversely, community welfare interests and individual goals may conflict. Marshall and Duff have put forward a strategy for the community welfare principle to cope with such a conflict.[85] This requires an identification of the collective goals and the individual goals the criminal law should protect. In the case of a conflict, collective goals may override individual goals, unless the individual goals are specifically recognised and protected in treaties and human rights legislation.[86] This is consistent

[81] Ibid.
[82] See S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.
[83] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 28.
[84] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 20.
[85] Ibid 11.
[86] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 29.

with Findlay, Odgers and Yeo, who conclude that criminal law is better to prohibit conduct that harms the public rather than a specific individual.[87] Consequently, the community welfare principle recognises "the social context in which the law must operate and gives weight to collective goals",[88] rather than individual autonomy.

V INDIVIDUAL AUTONOMY

Findlay, Odgers and Yeo argue that the criminal law should respect individual autonomy.[89] This means that conduct should only be criminalised to the minimum extent necessary to provide other individuals with the same autonomy.[90] Advocates of the minimalist approach to criminal law are concerned about the overuse of criminal law because of its coercive and liberty-depriving consequences.[91] Minimalism accepts the need to criminalise direct wrongs on victims and to safeguard interests, but is concerned that the State, groups or other individuals will abuse their power.[92] Consequently, respect for individual autonomy is a justification for not criminalising conduct and is consistent with the notion of minimalism.

Ashworth acknowledges that it is unsustainable for individuals to have complete freedom without qualifications.[93] Jareborg argues that the criminal law could not protect all individual interests and that some individual interests are not worthy of protection.[94] The criminal law's protection of individual interests and values has been described as "selective…[and] fragmentary"[95] in character. In line with comment, Ashworth draws attention to gender bias in the criminal law.[96] While not every individual preference can be reflected in the criminal law, Marshall and Duff identify some broad individual

[87] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 5.
[88] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 28.
[89] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 3.
[90] Ibid. Individual autonomy does not justify victimless crimes: Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 188.
[91] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 4.
[92] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 31.
[93] Ibid 27.
[94] Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 526.
[95] Ibid 525.
[96] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 27.

interests, for example, life, liberty, property and health.[97] These examples are so broad that they overlap with the community welfare interests identified above. As the notion of "individual interests" becomes broader, the argument for over-criminalisation becomes stronger.

VI POLITICS OF LAWMAKING

Some decisions to criminalise conduct are based on the politics of lawmaking. For example, some criminal laws are enacted as the result of law reform commission reports prepared after consultation, campaign of a pressure group, greater public exposure of harms and the views of law enforcers.[98] Criminalising conduct may be seen as an "instantly satisfying political response to public worries"[99] about publicised inappropriate conduct. It is more proactive than merely consulting with the public or commissioning research. Ashworth agrees that the boundaries of criminal law are largely due to exercises of political power at various points in time.[100] Ashworth concludes that "there are many offences for which criminal liability is merely imposed by Parliament as a practical means of controlling an activity, without implying the element of social condemnation which is characteristic of the major or traditional crimes".[101] This view is consistent with modern criminal law being used to implement 'regulatory' offences, as discussed above. Consequently, the growth of modern criminal law "may reflect particular phases in contemporary social history, as written by the mass media and politicians".[102]

Prima facie, public opinion may appear to be an unintelligent place to determine whether to criminalise conduct or not. However, Lacey, Wells and Quick recognise that ordinary

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[97] S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.
[98] Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 25.
[99] Ibid 23.
[100] Ibid 1.
[101] Ibid 1-2.
[102] Ibid 25.

people shape the definition of crime.[103] They assert that public opinion and perceptions of public opinion are "enormously influential",[104] especially to politicians, who are accountable to the public.[105] Consequently, the criminal law should be continuously scrutinised to maintain the respect of the public.[106]

VII PRINCIPLES AND DISTINCTIONS

As discussed above, the principles of harm, immorality, community welfare, individual autonomy and the politics of lawmaking may underpin the decision to criminalise conduct. The principles endure conceptual difficulties and thus it is worthwhile distinguishing criminal law from civil law to inform the decision to criminalise conduct. This paper will explore the wrongdoing and compensation distinction, public and private distinction and the essentialist distinction.

VIII WRONGDOING AND COMPENSATION DISTINCTION

The wrongdoing and compensation approach was espoused by Mann, who suggested that key distinguishing feature between criminal and civil law is that criminal law is meant to punish and civil law is meant to compensate.[107] Seipp acknowledged this difference and referred to this as a "choice of vengeance or compensation".[108] Seipp contends that criminal law and tort law offer the victim a choice to pursue justice for a wrongful act in two different ways.[109] Seipp advanced an interpretation of this choice between criminal law and tort law as "one law for the rich and another for the poor".[110]

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[103] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 78.
[104] Ibid.
[105] Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law Text and Materials,* Law in Context (3rd ed, 2003) 78.
[106] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 12-13. See also Michael Kirby, 'Editorial' (2001) 25 *Criminal Law Journal* 181, 183.
[107] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1796.
[108] David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59, 84.
[109] Ibid.
[110] Ibid.

However, this interpretation does fail to recognise that some victims prefer to seek vengeance even though the offender may be wealthy.[111] Other commentators have suggested that criminal law is only invoked when tortious remedies are insufficient.[112] Overall, the wrongdoing and compensation distinction focuses on the end result. It does not provide much guidance on what types of conduct should be criminalised, except to say that criminalisation should be restricted to serious wrongs and used as a last resort. Of course, this leaves the debate about the level of "seriousness" open. In any event, Lindgren rejects the wrongdoing and compensation distinction because he asserts that most torts and crimes are based on wrongdoing and blameworthiness.[113] While this distinction is a useful starting point, the public and private distinction is more enlightening.

IX PUBLIC AND PRIVATE DISTINCTION

The public and private distinction asserts that criminal law focuses on collective interests. In particular, the public and private distinction suggests that criminal law is "primarily public"[114] and tort law is "primarily private".[115] Mann explains that criminal law sanctions certain wrongdoings because they "are public wrongs, violating a collective rather than an individual interest. The criminal sanction will apply even if no individual interest has suffered direct injury."[116] This is consistent with Blackstone's explanation that crimes are a breach of public rights that are due to the whole community, while civil injuries are private wrongs and infringe individual civil rights.[117] Further, criminal law should be used to prohibit conduct that "society believes lacks any social utility, while civil penalties should be used to deter (or "price") many forms of

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[111] Ibid.
[112] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1, 8.
[113] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29.
[114] Ibid 36.
[115] Ibid.
[116] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1806.
[117] See William Blackstone, *Commentaries on the Laws of England* (1979 (originally published in 1765)) 5-7.

misbehaviour (for example, negligence) where the regulated activity has positive social utility but is imposing externalities on others".[118]

The public and private distinction reinforces a procedural difference between criminal law and tort law, that is, that the Crown brings the action in a criminal case because it involves public interests, whereas the plaintiff brings the action in a torts case. More generally, Hall recognises that "crimes affect the whole community, considered as a community, in its social aggregate capacity…they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity".[119] In this way, the purpose of criminal law is to control anti-social behaviour.[120] Arguments have been for put forward to undermine the public/private distinction, that is, "that the personal is political or that the distinction is incoherent".[121] However, these arguments are weak and this distinction illuminates the boundaries of criminal law in a more precise manner than the essentialist distinction.

X ESSENTIALS DISTINCTION

The essentialist approach is synonymous with the saying "a crime is a crime is a crime…".[122] This approach is based on gut feeling.[123] In this regard, it may be analogised with preservation of morality, an aim of criminal law, because there is unlikely to be a shared gut feeling. Further, this distinction asserts that if the conduct was punished then it was criminal. Consequently, this distinction is inward looking and does not explain modern criminal offences. This distinction is flawed because it is not

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[118] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1876.
[119] Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) XLIII *Columbia Law Review* 753, 757.
[120] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795, 1807.
[121] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 37. An example of the example of incoherency appears in David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws - Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 86.
[122] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 36.
[123] Ibid.

based on evidence, research or argument.[124] It overlooks Coffee's comment that both criminal law and tort law seek to deter behaviour through punishment.[125] It also fails to recognise that some of the remedies available in criminal law are similar to tort law, for example, a fine and compensation. Further, it does not explain why some types of conduct are regulated by criminal law and others are regulated by tort law.[126] While the essentialist distinction has some serious weaknesses and is not the only tool to separate criminal law from tort law, its gut feeling core appeals to common sense.

XI CONCLUSION

There is no unifying justification that persistently underpins the decision to criminalise conduct. The key principles discussed in this paper are harm, immorality, community welfare, individual autonomy and the politics of lawmaking. The exploration of these principles provides guidance on what conduct should be criminalised or not. For example, the harm and immorality principles need to be tamed in the criminalisation debate by providing a precise definition of "harm" and "morality". Similarly, community welfare and individual autonomy principles need to be tamed by developing a clear-cut definition of collective and individual interests, respectively. The more unruly the definitions of "harm", "morality", "collective interests" and "individual interests", the more likely criminal law is likely to encroach on civil law. Other influences on the dividing line between contemporary criminal and civil law are exercises of political power, pressure groups and the role of the media in exposing controversial issues to public.

Distinguishing criminal law from civil law provides guidance on what conduct should be criminalised or not. In particular, the wrongdoing and compensation distinction confirms that criminal law punishes wrongdoing and prohibits conduct. This distinction implies that criminal law should be limited to serious wrongs and used as a last resort. It

[124] Ibid 36-37.
[125] John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1992) 101 *The Yale Law Journal* 1875, 1875.
[126] James Lindgren, 'Why the Ancients may not have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 29, 37.

is consistent with the principle of minimalism. The public and private distinction holds that criminal law should protect collective interests, prevent social harms and prohibit (not merely price) conduct that does not have social utility. The essentialist distinction criminalises conduct based on gut feeling. Similarly, to the principles discussed above, the distinctions require the taming of certain terms, for example, “collective interests”, “morality” and “serious”. The scope of these terms impacts on the dividing line between contemporary criminal law and civil law.