ABOLISHING CONSENT AS A DEFENCE TO VIOLENT ACTS PERFORMED ON WOMEN IN THE PRODUCTION OF HARDCORE PORNOGRAPHY

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"Some people say that pornography is only fantasy. What part of it is fantasy? Women are beaten and raped and forced and whipped and held captive. The violence depicted is true. The acts of violence depicted in pornography are real acts committed against real women and real female children. The fantasy is that women want to be abused".

Andrea Dworkin. [1]

[1] Magnus Ullén ""A tangled web of mindfuck": Andrea Dworkin and the Truth of Pornography" (2016) 35(1) Tulsa Stud Women's Lit 145 at 146.

I Chapter 1: Introduction

The defence of consent has been referred to by Larry Alexander as one that operates like magic.[2] When one person assaults another, the former might be charged with assault. However, that person may, if the victim consented to such an assault, use that consent as a defence to prosecution. The *magical* function of the defence is that it can transform what otherwise would be unlawful conduct into an activity that is lawful.[3] This defence is inevitably necessary in everyday situations. For example, but for consent, every sexual act would be a crime. In this context, the defence operates to protect individuals from being prosecuted for perfectly acceptable activities. However, this dissertation will consider why consent should not be available as a defence to the following acts when performed in the commercial production of hardcore pornography:[4] asphyxiation, irrumatio[5], whipping, and the use of a foreign object by another person to penetrate a woman (**the 'Acts'**). I propose that the availability of the defence in this instance does not protect women from harm but instead maintains it. It is therefore necessary to remove the defence from these Acts, even if the woman consented.

Whilst it is true that most hardcore pornographic material is produced overseas, with 89% being produced in the United States,[6] such material could be produced in New Zealand. So, this dissertation considers the matter under New Zealand law to highlight the inadequacy of the current legal position, and to discuss the general issues that arise from the current position in New Zealand on consent as a defence to such assaults.

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[2] Larry Alexander "The Moral Magic of Consent" (1996) 2(3) LEG 165 at 165.
[3] Vera Bergelson "The Meaning of Consent" (2014) 12(1) Ohio State J Crim Law 171 at 171.
[4] Although there is no one definition of hardcore pornography, I will use the one given by the New Zealand Health Education Association, "A sexual action which depicts harm towards another human being i.e. degrades, violates, connects violence with sex, or involves the use of power over another individual or a group.": New Zealand Health Education Association "Teaching and learning about pornography in health education" (January 2020) <www.health education.org.nz > at 5.
[5] Irrumatio is defined as "aggressive insertion of the penis into a partner's mouth or throat".
[6] Peter Nowak "U.S. Leads the Way in porn production but falls behind in profits" (5 January 2012) Canadian Business <www.canadianbusiness.com>.

In New Zealand, absence of consent is not part of the statutory definition of assault (or other violent offences, except sexual violation). Instead, consent is preserved as a common law defence, that may be raised by the accused, by s 20(1) of the Crimes Act 1961.[7]

New Zealand's current legal position on consent as a defence to various forms of assault was considered in depth by the Court of Appeal in *R v Lee*.[8] Here the Court came to the view that consent,[9] or even honest belief in consent, is a defence to any infliction of injury (besides death),[10] except in certain instances of grievous bodily harm where public policy considerations require the removal of the defence.[11] Generally, the defence is available even if injury was intended or the perpetrator was reckless as to harm, although the court in *R v Lee* created an exception to this principle in the instance of fighting.[12] Moreover, decisions of the New Zealand courts have held that where there is no harm of a certain kind to the victim – that is, harm that constitutes an 'injury',[13] in the sense of 'actual bodily harm' – that consent is always available as a defence. Thus, overall, New Zealand law takes an exceedingly liberal stance on the level of harm that individuals can legally consent to.

The Acts about which I am concerned would only be criminalised, under my proposals, when they were performed on women in the commercial production of hardcore pornography. This is because the harm the women experience is heightened by the effects of the commercial distribution of such material. In contrast to sexual acts performed in private, where a person is largely directly vulnerable in relation to their partner(s) only, pornography subjects women to viewers worldwide who are given the opportunity to derive pleasure from watching women getting abused and exploited.[14]

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[7] Section 20(1) states that "All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment": Crimes Act 1961, s 20 (1).
[8] *R v Lee* [2006] NZLR 42 (CA).
[9] Defined as "true, real or genuine consent": *Barker v R* [2010] 1 NZLR 235 at [105].
[10] Crimes Act 1961, s 63.
[11] *R v Lee*, above n 8, at 43.
[12] *R v Lee*, above n 8, at [315].
[13] Injury is defined actual bodily harm. "That is discomfort that is more than minor or momentary, though it need not be permanent or long-lasting. It may be internal or external.": Courts of New Zealand "Definitions" (1 October 2019) <www.courtsofnz.govt.nz>.
[14] Erinn Gilson *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge, New York, 2013) at 156.

This is largely a result of the rise of the internet, whereby pornography has ventured into unchartered territory, becoming increasingly popular yet simultaneously less regulated.[15] Before the internet, pornography primarily came in the form of DVDs and magazines that were both regulated and censored at New Zealand's border.[16] Any violent material that did not meet New Zealand's regulations was not allowed into the country.[17] The material that was allowed in was given an age limit, and for individuals to obtain these materials they would have to show identification. Yet, in today's society, pornography in all forms is available to anyone that has an electronic device, regardless of age and with no identification needed. Therefore, the lack of regulation around hardcore pornography has resulted in it being widely accessible, allowing for content of women being both physically and sexually abused to be available for virtually anyone to view in New Zealand. The pornography industry has developed into one that promotes, endorses and glorifies this abuse and exploitation.

A Concerns arising from the Commercial Production of Hardcore Pornography

This dissertation does not purport that all pornography is violent and thus warrants concern. Instead it seeks to isolate the harm that arises from the divisions of the industry that produce violent and abusive content. Largely, this kind of content is being produced in higher volume because pornography production companies generate revenue based on how violent the pornography is.[18] Thus, pornography studios are driven by financial incentives to shock the viewer by producing more violent content than their predecessors.[19] This ultimately generates a constant supply and demand for violent content which in turn limits the type of pornography being produced in the market.

The commercial production of hardcore pornography raises concern not only because of the harm experienced by the women appearing in the videos, but also because of the communal harms caused to women as a group and to society as a result of the Acts which are the focus of this dissertation, and their portrayal in the videos. When a woman involved in pornography is experiencing irrumation, or being whipped, asphyxiated or penetrated by a foreign object, she is experiencing the pain of these Acts. The viewer is witnessing this pain occurring. Violence

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[15] Fredrick S. Lane *Obscene Profits: Entrepreneurs of Pornography in the Cyber Age* (Routledge, New York, 2000) at xviii.
[16] Ursula Cheer Burrows and Cheer *Media Law in New Zealand* (7th ed, Lexis Nexis, Wellington, 2015) at 640.
[17] At 641.
[18] Louise Perry "The rise of "choking"" (28 August 2020) Standpoint Magazine <www.standpointmag.co.uk>.
[19] Perry, above n 18.

against women is thus promoted through the persistent reliance on tropes of violation, where female vulnerability and powerlessness are eroticised.[20] Women as a group are thus presented as submissive, powerless and vulnerable objects that are acted upon and often harmed by men.[21] As Elizabeth Janeway argues, pornography consists of harm to women; it is by its very nature violence against women.[22] Pornography succeeds in normalising this behaviour, while rendering the harm caused invisible.[23]

There have been attempts to regulate pornography both overseas and in New Zealand in which the law has placed limits on the autonomy of the viewer. In 2008, the United Kingdom criminalised the possession of certain forms of hardcore pornography, under section 63 of the Criminal Justice and Immigration Act.[24] This made it illegal to possess pornography that depicted necrophilia, bestiality, any act likely to cause serious injury to a person's genitals, anus, or breasts, and any act that threatens a person's life.[25] The 2008 Act notably did not criminalise the pornography sites, but the consumers that accessed them. In 2015, further legislation made it a crime to possess pornography that depicted rape. This depiction does not require a real crime to be committed, but rather it must only look real from the viewer's perspective.[26] However, Fiona Vera-Gray, an academic at the University of Durham, suggests that such legislation serves nothing more than a symbolic function, in which the state gives the appearance of disapproval whilst prosecutions for these crimes remain minimal.[27] New Zealand adopted a similar approach to England in the Films, Videos and Publications Classification Act 1993. This Act made it a crime to possess objectionable material that either "describes, depicts, expresses or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good."[28]

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[20] Gilson, above n 14, at 157.
[21] At 157.
[22] Erich Goode and Nachman Ben-Yehuda *Moral Panics: The Social Construction of Deviance* (Blackwell Publishing, Chichester, 2009) at 231.
[23] Gilson, above n 14, at 159.
[24] This section only takes effect in England, Northern Ireland and Wales: Criminal Justice and Immigration Act 2008 (UK).
[25] Criminal Justice and Courts Act 2015 (UK), section 37(2)(c).
[26] Criminal Justice and Immigration Act 2008 (UK), s 63(7).
[27] Louise Perry "Adult Entertainment? Why the normalization of extreme porn needs to be stopped" (10 July 2020) Standpoint Magazine <www.standpointmag.co.uk>.
[28] Films Videos and Publications Act 1993, s 3(1).

This dissertation proposes that regulation should be targeted at the production of hardcore pornography, rather than the consumption of it. This shift is necessary as the nature of the internet makes regulation, at a consumer level, practically very difficult. It will propose that to do so it is necessary to remove the defence of consent from these Acts in order to protect women from the harm that arises from them. Although this would limit women's autonomy to participate in such violence, I argue that such a limit is necessary due to the communal harm created by such material.

B The Main Legal Questions I will Examine

The second chapter of this dissertation will examine the nature of the harm involved in the commercial production of hardcore pornography. How the harm is defined is relevant to the availability of the consent defence. Decisions of the New Zealand courts have held that where there is no harm of a certain kind to the victim – that is, harm that constitutes an 'injury', in the sense of 'actual bodily harm' – that consent is always available as a defence. Thus, to prevent consent being available as a defence when an injury that would not be classified as actual bodily harm occurs, a broader definition of the harm or injury involved in the production of hardcore pornography is required. Thus, I will propose that the relevant definition of the injury[29] must be extended to include harm to dignity, to cover the harm involved. Otherwise, when the harm falls short of actual bodily harm, the consent defence will always be available. Making this case involves examining what the concept of dignity entails and its place within New Zealand's law concerning consent as a defence to assault.

The third chapter will outline the current position in New Zealand on consent as a defence to assault. This requires close analysis of *R v Lee,* the highest authority in New Zealand on this matter.[30] The legal position outlined in this case is problematic, from the point of view of the argument made in this dissertation, primarily because it generally permits the defence of consent to be available to the perpetrator, even when they intend to cause harm or are reckless as to its occurrence. This chapter also examines the case of *R v Barker*,[31] which reaffirmed the position in *R v Lee*, to illustrate the reasons for Glazebrook J's dissent. It will then outline the law of consent to assault in overseas jurisdictions, namely England, Canada and Australia.

[29] Defined as "Actual Bodily Harm": Courts of New Zealand "Definitions" (1 October 2019) <www.courtsofnz .govt.nz>.
[30] *R v Lee*, above n 8, at [313].
[31] *R v Barker* [2009] NZCA 186.

The fourth chapter will propose that the common law should create a second exception, additional to fighting, which would remove the defence of consent from the Acts which are the focus of this dissertation. In addition, the law must extend the definition of the injury involved in assault to include harm to dignity, and so limit the scope of consent in this context.

The last chapter will propose a new offence to be enacted by Parliament, that would remove the defence of consent when the Acts were performed during the production of pornographic images or videos intended for distribution. I acknowledge that there are drafting and interpretation issues that would arise with the proposed new offence. Nevertheless, it is suggested the Acts should be criminalised in this way due to the harm they cause.

C My Conclusions Briefly Prefigured

In summary, this dissertation suggests that consent should not be available as a defence to the perpetrator when the Acts, which are the focus of my concern, are performed in the commercial production of hardcore pornography. The Acts I have listed may not be the only ones that should be covered by such an offence, but they can serve to symbolise the violence against the women involved. I will examine the sorts of harm that occur in the production of such violence and find that there is an infliction of harm to women's dignity which is not adequately prohibited in New Zealand. I propose two avenues for change, specifically (a) change through the common law or (b) through change by Parliament via the enactment of a new offence, while assessing the limitations and benefits of each. I will conclude that, although developments in the common law could succeed in limiting the defence, statutory reform would be the most effective approach.

II *Chapter 2: Harm*

New Zealand law establishes a complex framework for addressing consent to suffer harm in the context of the production of hardcore pornography. One of the problems, for the purposes of the argument in this dissertation, concerns the way in which the relevant harms or injuries are defined for the purposes of the consent defence. Decisions of the New Zealand courts have held that where there is no harm of a certain kind to the victim – that is, no harm constituting an 'injury', in the sense of 'actual bodily harm' – that consent is always available as a defence.[32] In hardcore pornography, the Acts which are the focus of this dissertation may not in all circumstances cause actual bodily harm and therefore would not be viewed as an injury of the relevant kind. This would mean that, when injuries short of actual bodily harm occur, consent would always be available as a defence. Thus, to prevent consent being available as a defence when an injury that would not be classified as actual bodily harm occurs, a broader definition of the harm or injury involved in the production of hardcore pornography is required.

This chapter will propose that there is an inherent harm to dignity when these Acts are performed in the production of hardcore pornography and therefore New Zealand's definition of injury, for this purpose, must be extended to protect women against this harm. This involves examining what the concept of dignity entails.

A An Overview of the Violence in Hardcore Pornography

In 2020, the New Zealand Health Education Association found "much of hardcore pornography depicted sexual acts that are violent, demeaning, dehumanising, or exploitative and with no consideration of consent, or pleasure for women involved".[33] Furthermore, in 2010, a study of 304 of the top circulating pornographic videos found that 88.2% contained physical aggression, principally spanking, gagging, and slapping. The perpetrators of such aggression were primarily men, with the targets of such aggression being primarily female.[34] A case study into a particular pornography director highlighted the extreme violence and cruel treatment present in hardcore pornography in which the director (who was also the male porn actor in his films) subjected women to inhumane acts. Some of the acts included urinating and spitting[35] on his

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[32] *R v Lee,* above n 8.
[33] New Zealand Health Education Association, above n 4, at 6.
[34] Ana J Bridges and others "Aggression and Sexual Behaviour in Best-Selling Pornography Videos: A Content Analysis Update" (2010) 16(10) Violence Against Women 1065 at 1065.
[35] Katherine Viner "While we are shopping" (5 June 2020) The Guardian <www.theguardian.com>.

female co-stars and inserting a speculum into women's orifices and widening them to an extreme degree. In an interview he claimed proudly, "I started pissing down their throats several times during a scene, often causing them to vomit uncontrollably while still reaming their throats".[36] This abuse and harm is often advertised to market the film to viewers, with phrases such as "red, glistening anal prolapse", "prolapsing rectum" and "her ass impaled on his boner", which serves to illustrate the prevalence of sexualised violence against women inherent in the hardcore pornography industry.[37] Some accounts provided by female actresses who have been exposed to such abuse are given below:

Alexandra Reed claimed:[38]

> After being whipped and caned for 35 minutes I've never received a beating like that before in my life. I have permanent scars up and down the backs of my thighs. It was all things that I had consented to, but I didn't know quite the brutality of what was about to happen to me until I was in it.

Regan Starr claimed:[39]

> I got the shit kicked out of me. I was told before the video – and they said this very proudly, mind you – that in this line most of the girls start crying because they're hurting so bad . . . I couldn't breathe. I was being hit and choked. I was really upset, and they didn't stop. They kept filming. You can hear me say, 'Turn the f*cking camera off', and they kept going.

Jersey Jaxin claimed:[40]

> Guys punching you in the face. You have semen from many guys all over your face, in your eyes. You get ripped. Your insides can come out of you. It's never ending.

Alexa Milano claimed:[41]

> My first movie I was treated very rough by 3 guys. They pounded on me, gagged me with their penises, and tossed me around like I was a ball! I was sore, hurting and could barely walk. My insides burned and hurt so badly. I could barely pee and to try to have a bowel movement was out of the question. I was hurting so bad from the physical abuse from these 3 male porn stars.

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[36] Tom Digby *Love and War: How Militarism Shapes Sexuality and Romance* (Columbia University Press, New York, 2014) at 68.
[37] Collective Shout "The Sex Factor: Mainstreaming and normalising the abuse and exploitation of women" (24 July 2014) <www.collectiveshout.org> at 4.
[38] Collective Shout, above n 37.
[39] Collective Shout, above n 37.
[40] Collective Shout, above n 37.
[41] Collective Shout, above n 37.

In New Zealand, provided the women consented, the perpetrator would have a defence to every act addressed by these women. Such an illustration helps to exemplify the broad ambit of the defence in New Zealand. I propose that, irrespective of the level of injury caused, there is an infliction of harm to dignity in this context. It is thus necessary to protect women from this harm, so consent should not be available as a defence when this kind of injury is caused.

B Dignity

To understand how the concept of dignity would operate in the context of the criminalisation of the production of hardcore pornography, it is important to understand the complexities that surround the concept of dignity.[42]

Some scholars have suggested that dignity ought to be protected as a human right, but it has also been suggested that dignity itself is the premise, or ground, of human rights: that is, the basis from which all human rights flow. The use of *dignity* thus appears to have a dual meaning. In one sense, it is stated that all humans have dignity and that this is the source and ground of human rights.[43] For example, the International Covenant on Civil and Political Rights in its preamble begins by recognising that the rights contained in the covenant "derive from the inherent dignity of the human person".[44] Yet, it is also said that people have a right to dignity, or a right to have their dignity protected.[45] In this sense, dignity is presented as the content of a particular human right and what people are entitled to. This duality has incited scholars to use philosopher Jeremey Bentham's argument surrounding the similarly broad terms liberty and equality, to suggest that such terms may be meaningless.[46] That, in fact, the blurring of the distinction between content (a right to dignity) and justification (rights based on dignity) means that the claim to a human right is being put forward as self-justifying.[47] However, Jeremy Waldron claims that dignity in this context is not meaningless, but rather it is used to convey something about the status of a human being as well as illustrate the demand that that status should be respected.[48]

[42] Jeremy Waldron "Dignity and Rank: In Memory of Gregory Vlastos" (2007) 48(2) European Journal of Sociology 201 at 204.
[43] At 203.
[44] At 203.
[45] At 204.
[46] At 204.
[47] At 204.
[48] At 204.

1 Harm to dignity in the context of hardcore pornography

If dignity is taken to mean the content of a rights-demand that inheres in every human being, then to allow the Acts which are the focus of this dissertation to be performed on women is an inherently dignity-denying action.[49] The Antipornography Civil Rights Ordinance, drafted by Catherine MacKinnon and Andrea Dworkin, submits that pornography objectifies women into "dehumanised sexual objects, things or commodities."[50] Such objectification infringes on a woman's right to self-determination, autonomy, and status as a human being.[51] To use women in pornography as a sexual object is to treat them as a means to an end, which, according to Kantian theorists, is inexcusable.[52] Such objectification is reinforced by the titles of some pornographic films, including "Bowlin' in her colon" and "ATM Machines".[53]

Conversely, Cass Sunstein points out that some argue that objectification is a good thing, something that is a "wonderful part of sexual life" and "within a context of equality, respect and consent, objectification may not be so troublesome".[54] In response, Nussbaum suggests that MacKinnon and Dworkin would find it difficult, if not impossible, to reconcile "equality, respect and consent" with objectification. On this point, Mackinnon claims: "Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights of all kinds."[55] A similar sentiment was expressed by the Canadian Supreme Court, in *R v Labaye*.[56] The Court referred to human dignity in their assessment of what amounted to indecency and noted: [57]

> [c]onduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them. Such conduct may violate formally recognized societal norms, like the equality and dignity of all human beings.

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[49] Martha C. Nussbaum "Objectification" (1995) 24(4) Philos Public Aff 249 at 250.
[50] Winifred Ann Sandler "The Minneapolis Anti-Pornography Ordinance: A Valid Assertion of Civil Rights?" (1985) 13(4) Fordham Urb LJ 909 at 912.
[51] Catherine Mackinnon "Not a Moral Issue" (1984) 2(2) Yale L& Pol'y Rev 321 at 321.
[52] Nussbaum, above n 49, at 268.
[53] Ana J Bridges and others, above n 34, at 1075.
[54] Nussbaum, above n 49, at 250.
[55] Catherine Itzin "Pornography harm and human rights – The European Context" (1995) 16 (107) Tolley's Journal of Media Law and Practise 107 at 109.
[56] *R v Labaye* [2005] 3 SCR 728.
[57] Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19(4) EJIL 655 at 703.

Consequently, although some women may claim they receive pleasure from consenting to misogyny or violence in pornography, the harm caused to all women, and to society as a whole, by allowing such content, outweighs the subjective pleasure some women may experience.[58] When the industry is creating porn specifically to depict women being punished, in pain, crying and vomiting from the abuse, and women being demeaned verbally, in explicitly dignity-denying ways, the worldwide effects of these acts outweigh the pleasure of a small group.[59] Therefore the message of degradation in this context can be described as a communal harm in which the distribution of this material to millions of viewers worldwide renders the expressive function of pornography objectively harmful, evidenced by forty-two billion views Pornhub received in 2019.[60]

Therefore, it is ultimately the way that people interact with hardcore pornography and the attitudes it constructs that generate this communal harm to women's dignity, even when no injury of the kind currently known to law is caused.

C Recognition of Dignity in New Zealand

There has been notable recognition of harm to dignity in New Zealand in employment cases.[61] In *Ballylaw Holdings Ltd v Henderson*,[62] the Employment Court awarded the plaintiff $10,000 for loss of dignity; and in *Hammond v Credit Union Baywide*,[63] the Human Rights Review Tribunal awarded the plaintiff $98,000 for loss of dignity.

One recent case in New Zealand, *Marshall v IDEA Services Limited*, addressed how the concept of dignity ought to operate in New Zealand, in a human rights context. The Human Rights Review Tribunal conceded that human dignity is a complex subject in law and that, while the normative status of dignity is stronger than ever, its semantic status is most unclear.[64] The Tribunal suggested that the meaning of dignity is highly contextual and perhaps can never

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[58] Meghan Murphy "The conversation about abuse in porn needs to extend beyond harm on set" (18 March 2018) Feminist Current <www.feministcurrent.com>.
[59] At 16.
[60] Curtis Silver "Pornhub 2019 Year in Review Report: More Porn, More Often" (11 December 2019) Forbes <www.forbes.com>.
[61] New Zealand Law Society "Compensation for Loss of Dignity: the illusive search for a principled approach" (31 March 2017) <www.lawsociety.org.nz>.
[62] *Ballylaw Holdings Ltd v Henderson* [2003] 1 ERNZ 313.
[63] *Hammond v Credit Union Baywide* [2015] NZHRRT 6.
[64] *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT 9] at [68].

fully be described. As a result, they did not attempt a definition. However, in the absence of a statutory definition in New Zealand, the Court concluded that:[65]

> for the purposes of determining the present case…we take dignity to be a principle that every person has equal worth. Each person's humanity means something and has worth and each person's worth is equal to every other person's worth. Dignity is lost when, for example, a person is treated as less than human, in a way which violates his or her right to equality in dignity and rights.

Although the Court in *Marshall v IDEA Services Limited* did not define 'equal worth', they submitted that the abstract character of the formulation of human dignity in constitutional texts, which are much criticized for their lack of meaning, actually become an essential component. As a result of their generality, they provide a space in which the interpretation of human dignity can evolve with society, in a way that could not have been anticipated at the time of drafting. In this way, the concept of dignity can respond to the unpredictable. I propose that, following *Marshall v IDEA Services Limited,* the Acts, when performed in the commercial production of hardcore pornography, violate women's right to dignity (and to equality, when such acts are disproportionately performed upon women).[66] Ascertaining an exhaustive description of the harm to dignity caused in the production of hardcore pornography however is an intricate task. In describing hardcore pornography, Justice Potter Stewart of the United States Supreme Court said:[67]

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it.*

This implies that one must assess the harm caused to women in the production of hardcore pornography in context, rather than in isolation.[68] I endorse Justice Potter Stewart's view, that it is contextually the circumstances in which these women are being treated that makes this harm fundamentally worse and therefore affirms the prevalence of the infliction of harm to women's dignity in this context. The objectification and commodification of women's sexuality generates a dignity harm to the women in the videos, and communal harms, to women as a group, and to society. It does this by treating women as a means to an end, which diminishes their status as human beings, or treats them as if they were merely things.

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[65] At [86].
[66] At [86].
[67] Paul Gewirtz "I know it when I see it" (1966) 105(4) Yale LJ 1023 at 1024.
[68] At 1024.

1 Extending the definition of injury

There has not yet been any statutory recognition of harm to dignity in the context of defining assault, or the ambit of the consent defence, in New Zealand. There is however recognition in the Crimes Act of 'indignity', found in s 150.[69] This section states that it is a crime to offer any *indignity* to any dead body or human remains. This illustrates that there is some recognition of the concept by Parliament, meaning it is not inconceivable that harm to dignity could fit within the definition of assault. Additionally, there is also recognition in the Crimes Act of crimes against morality and decency. Although these terms are not identical to dignity, this too indicates that Parliament is willing to take a broader interpretation of harm.[70]

Furthermore, although harm to dignity cannot necessarily be understood as a psychological harm, there has been recognition in the common law that the definition of injury may be broadened in this context. This was discussed in the New Zealand case of *R v Kneale,*[71] in which the Court cited overseas decisions, namely Canada[72] and England,[73] which recognised that actual bodily harm is not restricted to physical harm. Although the Court in *R v Kneale* did not resolve the issue, they cited the earlier New Zealand cases of *G v S*,[74] and *P v T*,[75] which recognised that the impact on the plaintiff's psychological state amounted to bodily injury.[76] Thus, even though harm to dignity cannot necessarily be understood as psychological harm, such developments are indicative that the Courts are willing to extend the definition to include harm that is not just physical.[77]

The Northern Territory of Australia has gone a step further in statutory recognition of this kind of harm. There it has been codified.[78] To be liable of common assault in the Northern Territory, the statute lists a number of factors that would constitute an offence, amongst these factors, is if the victim suffers harm.[79] In 2005, the Northern Territory replaced 'actual bodily harm' in relation to certain forms of assault with a new statutory definition of harm, including harm to

[69] Crimes Act 1961, s 150.
[70] Crimes Act 1961.
[71] *R v Kneale* [1998] 2 NZLR 169 (CA).
[72] *R v McCraw* [1991] 3 SCR 7.
[73] *R v Chan-Fook* [1994] 1 WLR 689.
[74] *G v S* HC Auckland CP 576-93, 22 June 1994.
[75] *P v T* [1997] 2 NZLR 688.
[76] *R v Kneale*, above n 71, at [10].
[77] Abigail van Echten and others *Garrow and Turkington's Criminal Law in New Zealand* (online ed, LexisNexis) at [CRI188.7].
[78] Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT).
[79] Criminal Code Act 1983 (NT), s 188.

a person's mental health, whether temporary or permanent.[80] This approach still takes a broader view of harm, in that actual bodily harm, under this definition, exceeds mere physical harm.

I propose that New Zealand must, either through legislation or the common law, extend the definition of injury to include harm to dignity, for the purposes of determining the availability of the consent defence. Fundamentally, there needs to be recognition of harm to dignity as a relevant injury and for consent to this kind of injury to be outlawed as a defence. If not, when the harm falls short of actual bodily harm, no injury will be recognised of the relevant kind, so consent will always be available as a defence. It is necessary for these developments to occur, to protect women in the videos, and to protect women as a group, from infliction of harm to their dignity.

[80] Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT), s1A.

III Chapter 3: New Zealand's Legal Position on Consent as a Defence to Assault

> *The notion of consent as it operates in the law might be thought to be relatively unproblematic. This is however a very difficult area. For the concept of consent masks a number of problems: for example, what is the function of consent (is it truly a "defence"?); what are the conditions for giving valid consent; what capacity is required to consent; what are the outer justificatory limits of consent; and when can consent be withdrawn.*[81]

The law on the defence of consent to various assaults was considered in depth by the New Zealand Court of Appeal in *R v Lee* and was subsequently reaffirmed by the same Court in *R v Barker*. The Court in *R v Lee* came to the view that consent (or honest belief in consent) is a defence to any charge of assault, except in certain instances of grievous bodily harm where public policy considerations require the removal of the defence. The Court in *R v Lee* adopted an intention-based test, rather than a results-based test in which the issue is the level of injury intended to be caused, not the level of injury that actually results.[82] This position is problematic in three main respects from the point of view of the argument made in this dissertation: that certain Acts involved in the production of pornography should be crimes. The first problem is that New Zealand law's definition of the kind of 'injury' or 'harm' that must be involved is too narrow to encompass harm to dignity, as discussed in chapter two. The second problem is that, when an 'injury' of the relevant kind occurs, consent remains a defence, even when the perpetrator intends to cause the injury or is reckless as to its occurrence (though fighting is considered an exception: it is unlawful, even when the participants consent). The third, particularly serious problem, in that consent is available as a defence even to the intentional or reckless infliction of grievous bodily harm (unless public policy dictates otherwise). This chapter will preface the solutions to these problems.

A New Zealand Law on Consent as a Defence to Assault

The law in New Zealand on the defence of consent in this context is outlined in *R v Lee*. In this case, the trial judge had directed the jury that if the defendant had caused the victim's death by manual strangulation, the consent of the victim was irrelevant.[83] The judge adopted the approach taken by the majority in the English case *R v Brown,*[84] that held consent could not be a defence to the infliction of bodily harm unless the situation was one in which public policy

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[81] *R v Barker*, above n 31, at [101].
[82] At [55].
[83] *R v Lee*, above n 8, at [65].
[84] *R v Brown* [1993] UKHL 19.

favoured its availability.[85] However, the Court of Appeal unanimously rejected this view and quashed the conviction.[86] It ordered a retrial, which has yet to occur, as the accused has fled the country.[87]

The summary of the New Zealand legal position is provided by Glazebrook J, who gave the leading judgment in *R v Lee*:[88]

> [312] The question of consent falls to be considered in accordance with the common law rules, apart from ss 61[89] and 61A[90] dealing with surgical operations and situations covered by s 63[91], which provides that no person can consent to the (intentional) infliction of death upon himself or herself including (probably) murder as defined in s 167(b), (c) and (d)[92].
>
> [313] The test in New Zealand at common law is not a results-based test. If injury is not intended and there is no reckless disregard for the safety of others, then consent is a complete defence to any charge of assault, provided what occurred comes within the scope of the consent.
>
> [314] Where injury was intended or where the perpetrator was reckless, consent is still a complete defence, provided what occurred comes within the scope of the consent, except in the situations set out below.
>
> [315] Apart from sparring matches or playfights and organised matches conducted with a referee and according to established rules, consent is not a defence in relation to fighting. Those involved in sparring matches and playfights must not be acting in reckless disregard for the safety of others and must not intend to cause bodily injury for consent to be operative.
>
> [316] Where grievous bodily harm is intended, public policy factors may require the Judge to withdraw the defence of consent from the jury. The same applies where a perpetrator acts in reckless disregard for the safety of others. When deciding whether consent should be withdrawn as a defence on public policy grounds in such situations the Judge should take into account the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.

Evidently, situations in which consent is available as a defence to assault in New Zealand can be categorised under three distinct legal heads. The first is where injury is not intended and there is no reckless disregard for the safety of others. Then consent will be a complete defence to any charge of assault, provided what occurred came within the scope of the consent. The second is where injury is intended or where the perpetrator was reckless on that score. Here,

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[85] *R v Lee*, above n 8, at [321].
[86] *R v Lee*, above n 8, at [349].
[87] Mike Houlahan "Exorcism preacher's manslaughter conviction overturned" (12 April 2006) New Zealand Herald <www.nzherald.co.nz>.
[88] *R v Lee*, above n 8.
[89] Crimes Act 1961, s 61.
[90] Section 61A.
[91] Section s 63.
[92] Section 167.

consent is still a complete defence, provided what occurred comes within the scope of the consent (except in the instance of fighting). Lastly, where grievous bodily harm is intended or where the perpetrator was reckless as to its occurrence, consent is a complete defence unless public policy considerations favour the removal of the defence. Certain factors are then described as relevant to that public policy assessment.

1 The difficulty in applying these three legal positions to the Acts

The kind of harm that could arise from the Acts on which this dissertation is focused could fall under a number of these positions, depending on the kind of harm involved. For example, if the harm falls short of actual bodily harm, then there will be no injury of the relevant kind and consent will always be available as a defence. This would seem to mean that, in relation to asphyxiation, whipping and irrumatio, the legal position would be largely contingent on the amount of force used. If a large amount of force was used, it is easy to envisage a situation in which either an injury of the relevant kind, or even grievous bodily harm, could ensue. Distinctly, in relation to penetration by a foreign object, the kind of harm will largely depend on what kind of object is used. Objects that have been used in the production of pornography include things such as a loaded gun,[93] a garden gnome[94] and a bowling pin.[95] Where a gun or cactus is used to penetrate a woman, there is a significant risk that grievous bodily harm could ensue. However, the use of a bowling pin might not carry the same risks or even cause actual bodily harm. Such an analysis highlights the difficulty in applying New Zealand's current law on consent as a defence to assault to the Acts which are the focus of this dissertation. The next section of this chapter will outline further what the problems are and possible solutions.

B Problems with New Zealand's Current Position

1 The problem that the 'injury' or 'harm' in question is defined too narrowly

I propose that, when these Acts are performed, whether or not actual bodily or grievous harm is intended or the perpetrator is reckless in that regard, there is evident harm to dignity caused as a result. Therefore, as discussed in Chapter 2, I suggest that the scope of the requisite 'injury' or 'harm' be extended to include harm to dignity as an 'injury' of the relevant kind.

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[93] Maria Monrovia "13 People In The Porn Industry Get Real About The Worst (And Weirdest) Things That Ever Happened On Set" (25 January 2018) Thought Catalog <www.thoughtcatalog.com>.

[94] Noah Henry "13 Porn Categories That Will Make You Want To Quit The Internet" (23 May 2016) Mandatory <www.mandatory.com>.

[95] PornMD "Bowling Pin" (12 March 2020) <www.pornmd.com>.

2 The problem that (except in the case of fighting), when an 'injury' of the relevant kind occurs, consent remains a defence even when the perpetrator intends it or is reckless as to its occurrence

In New Zealand, if actual bodily harm, short of grievous bodily harm, is intended or there is recklessness, consent will be a complete defence, provided what occurred came within the scope of consent provided by the victim.[96] There is currently only one apparent exception to this principle: the case of fighting.[97] Therefore, in relation to the Acts with which this dissertation is concerned, provided that a woman involved in the production of the pornography consented to these Acts, even if the perpetrator intended to cause her an injury of the relevant kind, or was reckless, her consent will ultimately be a defence. Thus, to remove the defence from these Acts, I propose in Chapter 5 that statutory reform should render the performance of these Acts a strict liability offence. Alternatively, in Chapter 4, I suggest that the common law should be modified, to recognise a second exception, additional to fighting, making the defence of consent unavailable, in relation to these Acts, when the relevant injury was intended, or the perpetrator was reckless.

3 It is especially problematic that consent is available as a defence to grievous bodily harm (unless the public policy considerations suggest otherwise)

Under current law, where grievous bodily harm is intended or the perpetrator is reckless in that regard, consent will be a complete defence unless public policy considerations render the defence unavailable. The public policy considerations to be taken into account include "the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case".[98] The Court in *R v Lee* noted that the removal of the defence from the intentional infliction of grievous bodily harm on this basis is similar to the approach taken to the common law of maim, in which the harm inflicted is viewed as imposing a charge or burden on society.[99]

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[96] *R v Barker,* above n 31, at [61].
[97] At [315].
[98] *R v Lee*, above n 8, at [316].
[99] At [301].

Currently, there are still some situations in which consent will ultimately be a defence, even if grievous bodily harm results. This is the case with medical surgery, and with some sports, where individuals are able to consent to the infliction of such harm.[100] Surgery, obviously, is in the public interest. Although, it is perhaps incongruous[101] that the law permits consent to dangerous sporting activities, such as boxing and mixed martial arts ('**MMA**'), where the participants are permitted to intentionally inflict grievous bodily harm, for the purpose of entertainment.[102] Nevertheless, it may be that public policy supports the availability of this defence in these instances.[103]

It has not yet been held in New Zealand cases that public policy considerations would restrict consent being raised as a defence to the Acts about which I am concerned, even where grievous bodily harm was intended. It is possible that the public policy considerations could be applied in such a manner as to reach that result. But, generally, I would not propose that the public policy considerations favouring an exception for surgery and certain sports should be used as a yardstick for determining the lawfulness of activities. It is the contextual factors that differentiate the issue of consent to harm in surgery or sport from the case of these Acts performed in the production of hardcore pornography. In MMA for example, certain protocols are followed, such as comparing the competitors' weights, to minimise the risk of grievous bodily harm occurring.[104] Yet, in pornography there are no such protections that would prevent a smaller female being choked and whipped by a much larger or stronger male. Furthermore, women involved in production of hardcore pornography do not usually have access to the same level of medical assistance as participants in sporting activities, if grievous bodily harm results, which carries the risk of the harm exponentially increasing. There is also no equivalent of a referee present during the production of hardcore pornography to ensure that standards are complied with. [105]

[100] At [299].
[101] *R v Lee*, above n 8, at [299].
[102] Nicola Monaghan *Criminal Law* (5th ed, Oxford Press, 2008) at 184.
[103] At [299].
[104] At [303].
[105] At [303].

Therefore, I propose that consent should be deemed unavailable as a defence to the Acts which are the focus of this dissertation, as they are necessarily contrary to public policy due to the harm they cause. The solutions discussed in Chapters 4 and 5 would therefore remove the defence of consent when grievous bodily harm is caused as a result of the Acts.

C The Excessive Ambit of the Current Defence, Illustrated in Lee and Barker (especially in relation to intentional or reckless infliction of grievous bodily harm)

The case of *R v Barker*[106] illustrates the excessive ambit of the defence, as it is currently applied in New Zealand. This case reaffirmed the position outlined in *R v Lee.* This case involved complainant A (15 years old) and B (17 years old) who went to the appellant, Mr Barker's, premises.[107] Mr Barker was held to be aware of both complaints ages.[108] In relation to complaint A, Mr Barker, in the course of BDSM, tied A up and whipped her while she was suspended.[109] He later used a scalpel to cut a dragon symbol into her shoulder. During these acts, there were sexual overtones, including the appellant having A stimulate masturbation.[110] In relation to Complaint B, Mr Barker dressed her up in a leather corset, a G-string and high-heeled boots. He then suspended B from the ceiling and cut into her breasts and wrists. He then untied her and pressed her body against a mirror to create a "blood angel".[111] All whilst Mr Barker was aware that B was under the influence of nitrous oxide.[112]

The issue for the Court of Appeal in *R v Barker* was whether the trial judge was correct in withdrawing the defence of consent from the jury on public policy grounds. Although Hammond J, who gave the leading judgment, expressed "complete dismay and distaste at the exploitative and tawdry activities of Mr Barker in relation to these young women", he held that the trial judge was wrong to remove the defence from the jury.[113] For the purpose of this dissertation, Glazebrook J's dissent is useful in highlighting the flaws of the current legal position.

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[106] *R v Barker*, above n 31.
[107] *Barker v R* [2010] 1 NZLR 235 at [235].
[108] At [235].
[109] At [235].
[110] At [235].
[111] At [235].
[112] At [235].
[113] *R v Barker,* above n 31, at [171].

1 Reasons for Glazebrook J's dissent

(a) Should the defence apply with regard to scarification in a sexual context even if no more than bodily harm is intended?

Glazebrook J in dissent held that scarification done in a sexual context on a child who is under 16 should, along with fighting, be an additional exception to that referred to in *Lee,* where consent would not be a defence even if no more than mere bodily injury was intended.[114] Glazebrook J suggested that it is contrary to public policy for the law to take the position that a girl under 16 could not consent to her 15 year old boyfriend touching her breast but could consent to being disfigured by a 50 year old man in the course of a sexual sado-masochistic and degrading ritual.[115] Glazebrook J concurred with the trial judge that it was correct to withdraw the defence, even if no more than mere bodily injury was intended. Glazebrook J added that, even if a second exception was not to be specifically created, given the particular combination of factors in A's case, the public policy factors indicated that defence should have been removed regardless.[116]

(b) Can the defence be removed from the conduct performed on complaint B on public policy grounds, if the harm falls short of grievous bodily harm?

The trial judge did not reach any conclusion as to the level of harm that was intended with regard to B. However, Glazebrook J considered that the injury went beyond intent to cause mere bodily injury, yet fell short of grievous bodily harm.[117] Nevertheless, Glazebrook J still considered that public policy considerations should be assessed to ascertain whether removing the defence was justified.[118] The trial judge had considered that the following factors outweighed the social utility of the scarification and the complaint's right to personal autonomy[119] (and Glazebrook J agreed): "the vulnerability of the complainant, consumption of nitrous oxide, sexual overtones, the unprofessional and degrading manner in which the acts occurred and the whole BDSM context." [120]

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[114] At [75].
[115] At [74].
[116] At [89].
[117] At [81].
[118] At [81].
[119] At [87].
[120] At [87].

Glazebrook J added that such behaviour would undoubtedly be considered abhorrent to the vast majority of New Zealand citizens.[121] It is relevant, for the purpose of assessing the Acts which are the focus of this dissertation, that Glazebrook J commented that: "whether the judge would have been justified in removing consent had B been older is not a question that arises in this appeal and I make no comment on it.[122] In this statement, Glazebrook J (although dissenting in the case) leaves open the possibility that further exceptions may be created by the Courts.

D Overseas Jurisdictions (especially in relation to intentional or reckless infliction of grievous bodily harm)

1 England

England's current position on consent as a defence where actual bodily harm occurs is that the impugned acts must fall within one of the following four categories for consent to be effective: (a) surgery, (b) regulated sports, (c) chastisement of children, and (d) tattooing and ear piercing.[123] Where the harm falls short of actual bodily harm, the defence in England will be available to simple assault. The English approach is notably different to that of New Zealand, in that England uses a results-based test, rather than an intention-based test. In England, if actual bodily harm or more occurs, irrespective of whether it was intended, the defence will be removed unless public policy considerations favour otherwise.[124]

The case of *R v Brown*[125] is particularly relevant to the Acts which are the focus of this dissertation. It illustrates the parameters of the defence in England. It involved a number of appellants who were members of a group that consented to perform sadomasochistic acts on each other. The activities were videoed, and copies were distributed to members of the group. These acts were intended to, and did, cause bodily injury but not of a serious kind.[126] The majority of the House of Lords concluded it was not in the public interest to allow a victim to consent to the infliction of actual bodily harm.[127] The Court noted that, although consent was always a defence to the summary offence of common assault, it was only a defence where injury was a foreseeable incident of a 'lawful activity', and they did not consider that

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[121] At [87].
[122] At [88].
[123] Daniel Bansal "Body Modifications and the Criminal Law" (2018) 82(6) J Crim Law 496 at 496.
[124] *R v Lee*, above n 8, at [290].
[125] *R v Brown*, above n 84.
[126] At [187].
[127] At [188].

sadomasochistic activities were a 'lawful activity' of this kind.[128] Lord Templeman considered:[129]

> In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous.

Although this case has been subject to controversy, the decision was reaffirmed by the European Court of Human Rights.[130] Therefore, it is generally accepted in England that consent is not a defence to the intentional infliction of actual bodily harm when performed in a sadomasochistic context.

2 Canada

In Canada, intention and lack of consent are both statutory elements of the crime of assault, codified in s 265(1)(a) of the Canadian Criminal Code. There are, however, limits on consent outlined by the Supreme Court of Canada in *R v Jobidon*,[131] in which the Court held that consent to assault is subject to public policy considerations.[132] Gonthier J, writing for the majority, held that due to public policy considerations, the defence of consent will not be available in the context of consensual fights where bodily harm is both intended and caused.[133] Consent, however, cannot be vitiated by public policy considerations in the case of certain "socially useful activities" such as medical surgery and sporting events.[134]

Regarding sadomasochistic activities, the Ontario Court of Appeal, in *R v Welch*,[135] appears to have taken an approach similar to the majority position in *Brown.* The case concerned a victim who, the defence alleged, had agreed to be tied to the bed and beaten. The harm caused was not serious, however Griffiths JA concluded that the trial judge was correct in removing the defence of consent due to the sadomasochistic nature of the conduct. Griffiths JA interpreted *Jobidon* as holding that a victim cannot consent to the infliction upon them of bodily harm except for a generally approved social purpose. Griffiths JA noted that acts of sexual violence were not included by the Supreme Court among the exceptions wherein consent would be

[128] At [189].
[129] At [190].
[130] At [199].
[131] *R v Jobidon* [1991] 2 SCR 714.
[132] *R v Lee*, above n 8, at [234].
[133] *R v Zhao* [2013] ONCA 293 at [63].
[134] At [60].
[135] *R v Welch* (1995) 43 CR (4th) 225.

available.[136] However, the subsequent Ontario Court of Appeal case *R v Zhao,*[137] noted that the decision in *Welch* should not be used as a general principle to dictate that consent was unavailable in all cases of sexual assault occasioning actual bodily harm. Instead, *R v Zhao* posited that the defence of consent would be available if the Crown failed to prove that the accused both intended to, and in fact did, cause bodily harm.[138]

3 Australia

The Australian position was summarised by the New Zealand Court in *R v Lee,* citing Bagaric and Arenson, *Criminal Laws in Australia*:[139]

> An assault with consent is not an assault at all.' Though true in a very limited sense, this statement is subject to a major qualification; namely, that as a matter of public policy the law does not allow persons to consent to the infliction of actual or grievous bodily harm. There are, however, some notable exceptions to this qualification: lawful sporting events, surgical procedures, and lawful chastisement. Moreover, in the Code jurisdictions it would appear that as a general rule, consent to harm will operate as a defence to any degree of harm: Lersenger v Carroll (1989) 49 A Crim 51.

The definition of "assault" is provided by the common law in the Australian Capital Territory, New South Wales, Victoria and South Australia. These jurisdictions have adopted an approach similar to that in *R v Brown,* in which, as a matter of public policy, individuals are unable to consent to the infliction of actual or grievous bodily harm. In Queensland, Northern Territory, Western Australia and Tasmania, "assault" is defined in the states' respective Criminal Codes. In these jurisdictions, absence of consent is an element of the offence of assault in all these states except Tasmania, where consent is a defence to assault.[140]

E Summary

As Hammond J's quote at the start of this chapter illustrates, the law of consent, as it operates with regard to assault, is a very difficult area. New Zealand law, in relation to overseas jurisdictions discussed, appears to take the most liberal stance in which consent is a defence to any assault, even when there is an intention to cause grievous bodily harm. Canada, England and Australia tend be more conservative in their approach where actual or grievous bodily harm is intended. Generally, on that view, where the perpetrator of the Acts that are the focus of this

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[136] *R v Lee*, above n 8, at [241].
[137] *R v Zhao* [2013] ONCA 293.
[138] At [110].
[139] *R v Lee*, above n 8, at [259].
[140] At [260].

dissertation intended to cause grievous bodily harm to a woman involved in the production of pornography, that would constitute a crime. However, all jurisdictions tend to agree that, if the harm falls short of actual bodily harm, then the defence will be available. These legal principles clearly prevent the Acts which are the focus of this dissertation being viewed as crimes currently, in many situations in which significant harm to women would be caused. I therefore propose that change to these legal principles is absolutely necessary to protect women from such harm.

IV Chapter 4: Common Law Developments

This chapter will propose that developments in New Zealand's common law are necessary to remove the defence of consent from the perpetrator when the Acts are performed in the commercial production of hardcore pornography. Generally, I will propose that the common law should create a second exception to the availability of the consent defence: when the Acts on which this dissertation is focused are performed in the commercial production of hardcore pornography and injury – including injury to dignity – is intended or risked.

A Exception to New Zealand's Current Legal Position in the instance of Fighting

Currently, there is only one activity wherein there is an exception, under New Zealand law, to the principle that consent can ultimately be a defence to a charge of assault where no more than mere bodily injury is intended and caused.[141] It is not available as a defence to fighting, except in sparring matches, play fights and organised matches conducted with a referee according to established rules. This exception prohibiting fighting was affirmed by the Court in *R v Lee.* In deciding whether such an exception should be created, the Court looked at: (a) whether the activity was harmful to society; (b) whether it involves the appreciable possibility of causing more injury than the perpetrator intended or contemplated; and lastly (c) whether creating such an exception would be too paternalistic. The Court also looked at the history of the common law defence of consent in New Zealand, and concluded that it was clear that consent was irrelevant when it came to fights, as they were considered to be harmful to society (unless organised in accordance with established rules).[142] The Court cited Professor Glanville Williams in the *Textbook of Criminal Law* on why such fights are harmful to society and concluded that such a sentiment exists in contemporary New Zealand:[143]

> Such fights involve the appreciable possibility of causing more injury than the combatants intend or contemplate. They tend to occasion apprehension among members of the public and can spread into wider disorder; and the police in putting them down may themselves be injured. Moreover, when the giving and accepting of challenges to fight are socially allowable, the acceptance of a challenge is apt to be forced on a man as a matter of 'honour'.[144]

[141] At [295].
[142] At [295].
[143] At [295].
[144] At [296].

The Court considered the leading case on consent as a defence to assaults in Canada, *R v Jobidon*, in depth.[145] The judge there was faced with a similar issue of determining whether fights should be an exception to the general rule of consent. The leading judge, Gonthier J, said of fighting that "the sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight".[146] He foresaw a possibility that allowing a person to consent to force being applied to them by another may result in situations where the perpetrator derives some pleasure from the activity if they are doing so on a regular basis.[147] He noted that this was particularly problematic in a domestic setting, where family remembers have unstable mental health. He referred with approval to the following sentiment expressed in Fletcher, *Rethinking Criminal Law*: [148]

> If someone is encouraged to inflict a sadomasochistic beating on a consenting victim, the experience of inflicting the beating might loosen the actor's inhibitions against sadism in general.

As to the worry that such an approach would be too paternalistic, Gonthier J claimed: [149]

> Some may see limiting the freedom of an adult to consent to applications of force in a fist fight as unduly paternalistic; a violation of individual self-rule. Yet while that view may commend itself to some, those persons cannot reasonably claim that the law does not know such limitations. All criminal law is 'paternalistic' to some degree – top-down guidance is inherent in any prohibitive rule. That the common law has developed a strong resistance to recognizing the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect.

Ultimately, the Court held in *R v Lee* that contemporary social conditions in New Zealand indicate that there is less tolerance of fighting and instead a strengthened justification for fights to be an exception to the rule that consent is a defence where no more than mere bodily injury is intended and caused.[150] The Court acknowledged that further exceptions may be created, but these would be rare, and Judges should be very wary of creating exceptions based on their own subjective views of acceptable behaviour.[151]

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[145] At [233].
[146] At [237].
[147] At [237].
[148] At [236].
[149] At [237].
[150] At [296].
[151] At [296].

B Creation of a second exception for the Acts in Hardcore Pornography

In creating an exception for fighting, the Court looked at: (a) whether the activity was harmful to society; (b) whether it involves the appreciable possibility of causing more injury than the perpetrator intended or contemplated; and lastly (c) whether creating such an exception would be too paternalistic. This section will assess each consideration in relation to the Acts in hardcore pornography and conclude that a second exception should be created.

1 Harm to society

Overseas jurisdictions, specifically Canada and England, have recognised that such violence is harmful to society. The Canadian Supreme Court, in the case *R v Butler,*[152] recognised that exposure to violence in hardcore pornography translates into individuals' attributes and beliefs and held that the prevention of harm against women, children and society in general was of fundamental importance.[153] As a result, it justified an infringement on the right to free expression guaranteed in the Canadian Constitution.[154] The Court found evidence to suggest that viewers' attitudes towards women changed as a result of watching violent pornography.[155] Additionally, research conducted in 2019 by ComRes in the United Kingdom, found that younger women were more likely to experience forms of aggression that is depicted in pornography, namely acts such as hair pulling, slapping or being spat on.[156]This sentiment is shared by legal theorist Catharine MacKinnon who said that pornography contributes to society's perception of women as objects that enjoy being assaulted, abused and desire violence and cruelty.[157] This is particularly damaging as viewers associate the feeling of climaxing and pleasure with such violence and thus normalises this harm.[158] As a result, these attitudes then translate to how women are perceived in the world, promoting and eroticising the sexual abuse of women[159] and therefore incites and encourages violence against women as a group.[160] In view of the worldwide movement Me Too[161] and the rising awareness against sexual harassment in New Zealand's legal profession and Defence Force, I posit the support behind

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[152] *R v Butler* [1992] 1 SCR 452 at [108].
[153] At [108].
[154] At [122].
[155] At [108].
[156] Perry, above n 18, at 9.
[157] Dorothy Riddle *Moving Beyond Duality: Enough for Us All* (iUniverse, Indiana, 2015) at 102.
[158] At 102.
[159] Laurie J. Shrage and Robert Scott Stewart *Philosophizing About Sex* (Broadview Press, Canada, 2015) at 332.
[160] At 332.
[161] MeToo is an international movement against sexual abuse and harassment.

these movements is indicative that there is a growing intolerance for sexual violence against women in New Zealand. [162] Thus, it is contrary to public policy to allow the Acts which are the focus of this dissertation as they are evidently harmful to society.

Furthermore, from a pragmatic perspective, these concerns may be viewed as a communal harm, as society will likely be required to bear the cost of treating and maintaining people who are injured. Thus, there is arguably a communal interest in the avoidance of preventable harms.[163]

For these reasons, I would argue that a second exception is necessary to prevent the harm that occurs in society as a result of the Acts being performed on women in the commercial production of hardcore pornography, and that this sentiment reflects contemporary social attitudes in New Zealand.

2 The appreciable possibility of causing more injury than the perpetrator intended or contemplated

It likely that the performance of these Acts in hardcore pornography involve the appreciable possibility of causing more injury than the perpetrator intended or contemplated. Allowing a woman to consent to being asphyxiated or have irrumatio performed on her involves the serious possibility that a woman may suffocate, permanently damaging her breathing capabilities or, in the worst case, causing her death.[164] Likewise, penetrating a woman with a foreign object can result in rupturing a women's vulva or cause her to be infertile.[165] There is an additional risk because perpetrators are not trained to ensure they perform these Acts in a safe way. This lack of professional training is coupled with the reality that there is rarely any medical staff available during production to minimise the possibility of serious harm ensuing, unlike in sports games or surgeries where medical help is often immediately available. Therefore, these circumstances present a serious risk of causing injury above what the perpetrator intended or contemplated.

[162] Diana Clement "Working in the #MeToo era" (12 November 2019) NZ Herald <www.nzherald.co.nz>.
[163] Julia Tolmie "Consent to harmful assaults: The case for moving away from category-based decision making" (2012) 9 Crim LR 656 at 660.
[164] Martin Downs "The highest price for pleasure" (31 January 2005) Medicine Net <www.medicinenet.com>.
[165] Medical News Today "Causes and Treatment of Vaginal Tears" (2 May 019) <www.medicalnewstoday.co m>.

3 Not Within the Scope of the Consent Provided

Feminist theorists, including Catherine Itzin, have questioned whether sexual violence in pornography against women is actually consensual. Itzin writes that there have been multiple reports from women that they were coerced through physical and psychological threats to engage in pornography where they found themselves being raped, beaten and sometimes tortured.[166] An example of such torture was portrayed in a video seized by the Obscene Publications Branch at Scotland Yard which consisted of a woman having her labia nailed to the top of a table and needles being inserted into her nipples and genitalia.[167] In this regard it is questioned whether normal contract procedures are followed when hiring actresses and obtaining their consent, or whether illicit forms of pressures are used to incite women to cooperate.[168] Thus, the common law might take a more victim-centred approach when determining the range of acts to which a woman actually consents, when involved in the production of hardcore pornography: that is, what really was within the scope of her consent?

On the issue of the scope of consent, the Court in *R v Lee* noted that:[169]

> [308] Consent will only be operative if the impugned acts come within the scope of the activity consented to. This will, in most cases, limit the ambit of the defence to minor harm and reasonable risks, as people are unlikely to consent to the infliction of serious harm or to unreasonable risks. Consent is only a defence if what was done does not exceed what was consented to or what a perpetrator honestly believed was consented to. It will thus be necessary to identify either the exact level of injury the victim consented to have perpetrated on him or her or, more commonly, the level of risk of injury consented to. As pointed out by Lord Mustill, however, in many instances there will have been no express consent to a level of risk. Consent must be implied from the undertaking of the activity itself (see para [262] above).
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> [310] In addition, they give due recognition to the right to personal autonomy while allowing, where necessary, the interests of the wider society to prevail.

Therefore, in New Zealand, the general position is that consent will only be operative if the impugned acts come within the scope of the activity consented to. But *R v Lee* also recognised that any particular vulnerability of the person consenting can be taken into account in assessing the rationality of their consent.[170] I propose that factors such as the vulnerability of the victim

[166] Catherine Itzin *Pornography and Civil Liberties: Freedom, Harm and Human Rights* (Oxford University Press, Oxford, 1992) at 569.
[167] Itzin, above n 55, at 107.
[168] Shrage and Stewart, above n 159, at 494.
[169] *R v Lee*, above n 8.
[170] *R v Barker,* above n 31, at [83].

and the exploitative nature of the circumstances in which consent is given, casts doubts about the merit of autonomy and freedom of choice that the victim in hardcore pornography is employing.[171] Thus such factors are necessary to take into account when assessing the rationality of consent in this context.

(a) Vulnerabilities

Some films have been found to have graphically depicted the sexual abuse of adult women, and therefore document the victimization of women, in a similar manner to child pornography. One of the most famous cases was the 1972 movie *Deep Throat,* whereby, many years after the film was produced, the female actress Linda Lovelace alleged that she was forced by her husband to make the film, and that the viewers were essentially watching her get raped.[172] Another case illustrated director and porn actor Max Hardcore performing the Act of irrumatio on a female actress to the point where she suffocated and had to leave the set.[173] Hardcore then followed her and verbally abused her,[174] following which the actress went downstairs reluctantly to continue with the scene. However, the filming crew called an end to the scene, in fear of being complicit in rape. In both instances it is clear that there are significant power imbalances present which calls into question the autonomy or freedom of choice that the victim is employing.

Inherent in the industry is also the prevalence of sex trafficking, in which women are used against their will to participate in pornography.[175] The American campaign group TraffickingHub have documented cases where sex trafficking and child rape films have been uploaded to Pornhub.[176] In one instance, a 15-year-old girl who had been missing for a year was found after the police located 58 videos of her rape and abuse on the site.[177] In another, footage of a 14-year-old Rose Kalemba was released on Pornhub of her being gang raped at

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171 Tolmie, above n 163, at 660.
172 Lane, above n 15, at 107.
173 Julie Bindel "The Hardcore truth about women in porn" (14 July 2011) The Guardian <www.theguar dian.com>.
174 At 5.
175 International Labour Office *Profits and Poverty*: *The economics of forced labour* (International Labour Office, Geneva, 2014) at 26.
176 Perry, above n 27, at 17.
177 At 17.

knifepoint.[178] Even after this abuse was discovered Pornhub have not taken down the video and thus continue to profit from the footage documenting the abuse.[179]

There are also significant age vulnerabilities involved in the industry, whereby young women who are barely eighteen will often sign a contract, not knowing exactly what they are consenting to. Mia Khalifia, one of the top-ranking pornography actresses, entered the pornography industry at the young age of twenty-one. In an interview with BBC she claimed that the industry offers no advisors or lawyers to guide young actresses through the process. Therefore, oftentimes, young women do not know what the ramifications are of signing such contracts or understand the ambit of what they are consenting to.[180] On this point she said "producers and people high up use this to pressure girls into signing contracts which … make it hard for them to leave”.[181]

Female pornography actresses have spoken out about forms of financial coercion that have been used to obtain their consent, including actress Leigh Raven who claimed “A shoot is not complete and performers not paid until the exit interview, in which performers confirm the acts were consensual… A performer’s paycheck is held hostage unless they answer *correctly.*” [182] This is an especially prominent concern, considering the industry and agents offer women financial incentives, in which women are often offered twice the amount to engage in a hardcore rather than a softcore scene.[183] These financial pressures effectively economically coerce women into participating in more dangerous and violent scenes for greater financial award, which removes their autonomy if they are reliant on this income.

Significantly, when these events occur, there is not much women can do. Even if sexual violence occurs that goes beyond the scope of the woman’s consent, the industry has mechanisms in place to ensure that the perpetrator can avoid prosecution, such as relying on

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[178] At 17.
[179] At 17.
[180] Stephen Sackur “Mia Khalifia: Why I’m speaking about the porn industry” BBC News (YouTube, 7 September 2019) <www.youtube.com>.
[181] New Zealand Herald “Mia Khalifa: Popular Pornhub Star’s warning to women” (25 January 2020) <www.nzherald.co.nz>.
[182] Fight the New Drug “Not All Porn Is Consensual. Don’t Believe It? Just Ask These Performers” (26 June 2020) <www.fightthenewdrug.org>.
[183] Olivia Blair “How much porn stars really get paid according to leading agent for adult actors” (14 February 2017) The Independent <www.independent.co.uk>.

the contract signed before the filming began.[184] I submit that due to the inherent vulnerabilities woman experience, the common law needs to view such Acts as falling outside of the scope of any possible consent. Therefore, the defence of consent must be recognised as inoperative in this context.

4 Paternalistic considerations

The Court in *R v Lee* stated that "We are not legislators or law reformers, and so we do not have the ability to articulate a theory of consent based on a full consideration of the appropriate philosophical underpinnings".[185] However, they did acknowledge that there was room for development in the common law.[186] Despite autonomy and freedom being of considerable importance, it is generally accepted in society that public policy and public interest will on occasion require the state to play a paternalistic role.[187] On this issue, Gonthier J acknowledged that: [188]

> All criminal law is 'paternalistic' to some degree… That the common law has developed a strong resistance to recognizing the validity of consent to intentional applications of force in fist fights and brawls is merely one instance of the criminal law's concern that Canadian citizens treat each other humanely and with respect.

Thus, although the autonomy of the individual is to be respected, it is arguable, considering the background social conditions that make many women vulnerable to sexual exploitation by men, whether women in porn are acting autonomously and freely pursing their own ends.[189] If there is a problem with the voluntariness of consent or the decision-making power of the consenter, the court must declare the consent null and void. Such a decision would enforce rather than impede personal liberty.[190]

One of the arguments put forward in *R v Brown* was that individuals have a right to do with their bodies what they please. However, Lord Templeman, held that the criminal law has long placed restraints on activities that are considered to be dangerous and injurious to individuals

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[184] Tess Barker "What Does Consent on a Porn on a porn set look like" (7 March 2016) Vice <www.vice.com>.
[185] *R v Lee*, above n 8, at [261].
[186] At [261].
[187] Paul Farugia "Consent Defence in Sport and Sadomasochism" (1997) 8(2) Auckland U L Rev 472 at 473.
[188] *R v Lee*, above n 8, at [237].
[189] Shrage and Stewart, above n 159, at 300.
[190] Peter Schaber and Andreas Müller *The Routledge Handbook of the Ethics of Consent* (Routledge, London, 2018) at 201.

which, if allowed, would be harmful to society.[191] For example, the law criminalises drugs, because, even though it is an individual decision to consume such substances, the ramifications of legalising it would harm society in general.[192] Therefore, despite paternalistic apprehensions, it is necessary in some instances, to intervene.

C Summary

If women cannot legally consent to such Acts, then the harm arising could be prevented. Women would still have the freedom to act in some pornographic videos but could do so without the fear of being abused. This would create a safer environment for female actresses as well as safer viewing content for the public. Therefore, I propose that the Court should extend the current exception to include the Acts when they are performed in the commercial production of hardcore pornography. It is clear that the harm arising from the Acts warrants the creation of a second exception in the common law. I propose that the sentiment expressed by Gonthier J should apply in this context in which, "the sanctity of the human body should militate against the validity of consent to bodily harm inflicted".[193]

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[191] *R v Brown* [1993] 2 ALL ER at [80].
[192] At [82].
[193] *R v Lee,* above n 8, at [237].

V Chapter 5: Statutory Reform

This chapter will first identify the offences in the Crimes Act that regulate the Acts which are the focus of this dissertation. The current availability of the common law defence of consent to all these offences shows that statutory reform is necessary to remove the defence from the Acts.[194] If not, the harm caused to women will remain lawful. Accordingly, I then propose a new strict liability offence to be enacted into the Crimes Act, which would remove the defence of consent when the Acts take place during the production of pornographic images or videos that are intended for distribution. If removed, it would be a crime to commit the Acts, irrespective of whether the women consented. To ascertain whether statutory reform is desirable, I will assess the provisions in the Crimes Act that expressly remove the defence of consent from certain other offences, ultimately concluding that similar justifications warrant the removal of the defence in my proposed provision. Lastly, I will assess whether criminal punishment is justified or too paternalistic.[195] I acknowledge that there are certain drafting and interpretation issues with the suggested offence. Nevertheless, I propose that it is necessary for Parliament to codify the withdrawal of the defence.

The offence I propose is:

> Section X: Acts in the Production of Hardcore Pornography
> (1) It is an offence to perform any of the following acts on another person when the act takes place during the production of pornographic images or videos intended to be circulated to others:
> (a) asphyxiation;
> (b) irrumatio;
> (c) whipping; or
> (d) sexual manipulation of a foreign object.
> (2) It is not a defence to a charge under this section that the person upon whom the act was performed consented.

[194] Crimes Act 1961, s 20.
[195] Schaber and Müller, above n 190, at 199.

A Provisions that Criminalise the Acts

There are at least four provisions in the Crimes Act that address the assaults which are the focus of this dissertation. Notably, all four provisions make the defence of consent available, as they are either (a) silent on the element of consent or (b) expressly include the defence. Where the offence is silent, Robertson and Finn note: [196]

> the basic principle is that consent will provide a complete defence to harm short of death, whether inflicted intentionally or recklessly unless there are good policy reasons to forbit it.[197] This is codified in New Zealand by virtue of s 20.

Asphyxiation is specifically dealt with in s 189A of the Crimes Act.[198] To be liable, the perpetrator has to intentionally or recklessly impede another's breathing.[199] However, this provision is silent on the element of consent. Thus, by virtue of s 20, consent will be available to the perpetrator as a defence.

Irrumatio is an offence under s 135 of the Crimes Act, concerning indecent assault.[200] Section 128A comprises of a list of exceptions where consent will not be operative to this offence.[201] However, a woman consenting to irrumatio in the commercial production of hardcore pornography is not covered by these exceptions, unless her consent has been obtained by some kind of 'force'. Therefore, consent will usually be operative as a defence to s 135.[202]

Whipping is an offence in the Crimes Act under s 196, concerning common assault.[203] Consent is not mentioned in this provision, and therefore, if the women consented, the defence will be available to the perpetrator, by virtue of s 20.[204]

Penetration of another with a foreign object is an offence under s 128B of the Crimes Act, concerning sexual violation.[205] This crime is the most serious of the four, resulting in a

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[196] Crimes Act 1961, s 20.
[197] Bruce Robertson and Jeremy Finn *Adams on Criminal Law* (online ed, Westlaw) at [CA63.09].
[198] Section 189A.
[199] Crimes Act 1961, s 189A.
[200] Section 135.
[201] Courts of New Zealand "Indecent assault where consent is in issue (Section 135 Crimes Act 1961)" (1 October 2019) <www.courtsofnz.govt.nz>.
[202] Crimes Act 1961, s 135.
[203] Section 196.
[204] Courts of New Zealand "Assault by application of force (Section 196 Crimes Act 1961)(1 October 2019) <www.courtsofnz.govt.nz>.
[205] Crimes Act 1961, s 128B.

maximum of 20 years' imprisonment. Section 128A gives a list of exceptions where consent does not provide a defence. However, as with irrumatio, a woman's consent in the commercial production of hardcore pornography would not usually be subject to these exceptions, unless 'force' is used in obtaining her consent. Thus, consent will usually be operative as a defence to penetration with a foreign object, under s 128B. Moreover, if a woman is induced by the perpetrator to penetrate her own person with a foreign object, this would constitute an indecent act under s 135[206] (indecent act being defined in s 2(1)(b) of the Crimes Act).[207] However, by virtue of s 20, consent will be a defence to this act.

Therefore, the availability of the defence to all these offences reinforces the conclusion that statutory reform is necessary to remove the defence of consent from the Acts.[208] If not, the harm caused to women will remain lawful.

B Negating the Defence

It is important to acknowledge the policies promoted by the existence of the defence. Fundamentally, individual autonomy is at the forefront of the considerations for allowing it.[209] New Zealand, as a liberal democratic state, protects personal freedom, in that it allows individuals to determine the boundaries of their own bodily integrity, even if this may involve conduct that is dangerous.[210] This is evidenced by the law on the defence of consent: it promotes personal autonomy by allowing individuals to consent to dangerous conduct, even if it results in grievous bodily harm. Further examples include freedom of speech, in which, even though there are limitations, the Government permits individual autonomy by allowing individuals to express themselves without fear of legal sanction, even if their speech does cause others harm.[211]

The difficulty however lies in ascertaining when liberalism goes too far in protecting the freedom of the individual, when the exercise of that freedom generates harm. Examples of situations in which New Zealand law has prioritised intervention over personal autonomy

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[206] *R v Kahui* [2007] CRI-2006-057-1135 (HC) at [27].
[207] Crimes Act 1961, s 2(1)(b).
[208] Section 20.
[209] Tolmie, above n 163, at 660.
[210] At 659.
[211] Katharine Gelber "Political Culture, Flag Use and Freedom of Speech" (2011) 60(1) Political Studies 163 at 163.

include the criminalisation of drugs and requiring citizens to wear a seatbelt.[212] In such instances, Parliament has recognised that allowing individual autonomy inadequately protects society from the harm that may eventuate. Evidently, in contrast, in respect to hardcore pornography, Parliament has allowed women to consent to such activities, if they so desire and it is to their financial advantage, even if doing so causes them harm. I propose that allowing women to consent to the Acts which are the focus of this dissertation contradicts the purpose of the defence of consent and should cease. To substantiate this claim, it is necessary to discuss the purpose of the defence.

1 Purpose of consent as a defence

The American Law Institute Model Penal Code said of consent generally:[213]

> The consent of the victim to conduct charged to constitute an offence or to the result thereof is a defence if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

On this view, the defence of consent should generally only be available when this precludes certain harm or evil occurring. Otherwise, the defence is no longer serving its purpose. The American Law Institute further explained: [214]

> Consent is generally accepted as a defence where the injury is slight, but [this] points to a tendency in the cases to make moral judgments about the inequity of the conduct involved in assessing the seriousness of the harm that will preclude consent.

Thus, moral judgments about the inequity of the conduct will be relevant. In New Zealand, certain provisions in the Crimes Act say the defence of consent is simply not available regarding some offences. Here, the perpetrator, irrespective of whether the victim seemed to consent, cannot rely on the defence to avoid prosecution. The offences in which the defence is removed involve:

(a) Death: s 63.[215]
(b) Sexual conduct with dependent family member: s 131.[216]
(c) Sexual conduct with child under 12: s 132.[217]
(d) Female genital mutilation: s 204.[218]
(e) Further offences relating to female genital mutilation: s 204B.[219]

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[212] John Kleinig "Seat Belts and Helmets: Some Paternalistic Arguments" (1981) 24 (1) BASLP 72 at 72.
[213] American Law Institute *Model Penal Code* (American Law Institute, Pennsylvania, 1962) § 2.11 (a).
[214] *R v Lee*, above n 8, at [252].
[215] Crimes Act 1961, s 63.
[216] Section 131.
[217] Section 132.
[218] Section 204.
[219] Section 204B.

In removing the defence from these provisions, Parliament has said that some assaults can never be rendered lawful by consent. In doing so, Parliament effectively makes two statements: (1) the perpetrator cannot rely on the defence; and (b) the victim cannot render the act lawful by giving their consent. It is a difficult task to ascertain the general policies behind the circumstances in which Parliament considers it necessary to remove the defence. However, the apparent justifications for removing the defence from female genital mutilation, sexual conduct with a child under 16, and sexual conduct with a dependent family member, help assist in this task.

In removing the defence from female genital mutilation**,** the Crimes (Definition of Female Genital Mutilation) Amendment Bill would make it an offence to perform on any person, or cause to be performed, any act involving female genital mutilation.[220] Although the defence of consent is already unavailable to this offence, the Bill proposes to widen the ambit of the offence to encompass a greater range of harms. The ethical considerations mentioned in the commentary for this proposal are: [221]

> Female genital mutilation …. has no health benefits, and the health risks increase with the severity of female genital mutilation performed. We note that some women do not consider the practice to be mutilation and may have positive experiences from it. However, we believe that the negative implications of female genital mutilation, both physical and psychological, outweigh any positive experiences. Most submitters expressed support for amending the definition of female genital mutilation so that all forms are illegal in New Zealand. We believe legislative change is important to protect women and girls.

The ethical considerations for removing the defence from sexual conduct with a child under 12 are centred on protecting children against exploitation. Such sexual conduct, irrespective of whether it is consensual, is considered to be intrinsically wrong. Such a sentiment is expressed by Schaber and Müller: [222]

> In respect of children and sexual consent we should note two possible normative principles. One is that below a certain age a child cannot give consent. Thus, sex with a minor below that age is non-consensual and morally impermissible. This is so even if the minor voluntarily assents to sex. The crime of "statutory rape" captures this wrong. A second "protective" principle allows that at some age minors can consent. Nevertheless, it might be thought appropriate to protect such minors from entering into sexual relations with others (Scottish Law Commission 2007: Part 4). This could be to guard against their exploitation, or because it is thought that sex below a certain age, even if consensual, is intrinsically wrong.

[220] Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019 (194-2), s 204(a).
[221] Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019 (194-2) at 1.
[222] Schaber and Müller, above n 190, at 179.

In removing the defence from the offence of sexual conduct with a dependent family member, Parliament placed emphasis on the 'power or authority' that may exist within this relationship. The below considerations are provided in Hansard: [223]

> It is designed to provide protection for young persons from sexual abuse within the family, and to promote the family as a sanctuary in which young people can grow up without being subjected to such abuse. That clause has been strengthened by not requiring the Crown to prove that the young person consented, or that the defendant knew that the family member consented, to the sexual conduct because of the defendant's use of power or authority.

It nevertheless is clear that, in determining the role of the consent defence under the Crimes Act, Parliament is not focused purely on preventing harm. If it was, individuals would not be permitted to consent to activities such as dangerous sports, cosmetic surgery, or exorcism. Instead it takes a quasi-harm approach, assessing an amalgamation of factors that, when fused together, generate conduct that it believes should never be lawful. In this regard, ascertaining when the defence is to be removed is a highly contextual assessment, taking into consideration factors such as vulnerability, exploitation, and abuse of power. Significantly, the law protects not only children from these factors, but even adults, evidenced by the withdrawal of consent for female genital mutilation. English law has also sought to protect adults generally from the infliction of grievous bodily harm, with the Court in *R v Brown* holding that violent sado-masochistic acts between consenting adults was privy to criminalisation if the harms consented to amounted to egregious conduct.[224]

2 Operation of my proposed offence

So, where do the Acts involved in the commercial production of hardcore pornography lie on this spectrum? The United Kingdom's Home Office has summarised the vulnerability, exploitation, and harm present in this context. It has recognised not only the inherent harms to women involved in the production of hardcore pornography, but also the communal harm that occurs as a result of the distribution of this violent material. It therefore criminalised the

[223] New Zealand Parliamentary Debates (12 April 2005) 625 NZPD 20005.
[224] Schaber and Müller, above n 190, at 182.

possession of extreme pornographic images, as the Home Office explained reform was necessary to:[225]

> Protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they notionally or genuinely consent to take part. [Additionally to] protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.

Therefore, the Home Office acknowledged that both the harm caused to the victim in the production of the videos and the communal harm caused to society as a result of the distribution of this violent material, warrants the criminalisation of extreme pornographic images. I propose that such acknowledgment of the harm involved should encourage Parliament to remove the defence of consent, in the way I have outlined in the new offence I have drafted above, to protect these groups in society. The distribution of videos displaying the Acts which are the focus of this dissertation presents women as objects that enjoy being assaulted and abused, or desire violence and cruelty.[226] This in turn affects how women are viewed in society. To allow the status quo to continue is to enable perpetrators to perform these Acts with no legal repercussions. Ultimately, if the fundamental purpose of consent is to protect the victim (whether that be the women in the videos or society), then it is not serving that purpose, in this context. It is not preventing the infliction of the 'harm or evil' that is produced as a result of allowing consent.[227] For these reasons, I propose that, in order to protect women from these harms, statutory reform is necessary, and the defence ought to be removed.

C Paternalistic Considerations

It is common in liberal democratic societies to view consent as something that enhances one's liberty. However, if an individual's consent does not make the other's actions right, then one cannot say it is beneficial to allow the former's consent to be raised as a defence. If the perpetrator's action is inherently wrong, it cannot be said to benefit society to allow consent to be a defence.[228] Overall, such policies promote rather than impede personal liberty.[229] In

[225] The Crown Prosecution Services "Extreme Pornography" (10 September 2019) <www.cps.gov.uk>.
[226] National Center on Sexual Exploitation "Pornography and Public Health" End Sexual Exploitation (2 August 2017) <www.endsexualexploitation.org>.
[227] Schaber and Müller, above n 190, at 199.
[228] At 45.
[229] At 201.

ascertaining whether such an approach is too paternalistic, Müller and Schaber set out the test below:[230]

> Is it a private matter, in which case consent should shield from moral condemnation and criminal punishment the person who inflicts pain on the willing victim, or does the harm or evil of pain infliction go beyond the private interests of the participants?

The difficulty is primarily found in striking the correct balance between accommodating society's desire for some activities involving dangerous contact to continue and protecting participants from undue violence. The complexity stems from the inescapable tensions between the dual obligations placed on the state to both (1) respect individual autonomy and (2) protect the vulnerable from exploitation or abuse.[231]

I acknowledge that there may be women who benefit from these assaults and therefore would view statutory reform as infringing their autonomy. However, as outlined by the Home Office, the harm caused as a result of the Acts takes this matter beyond the private interests of the participants. As a result, the benefits are outweighed by the communal harm that ensues as a result of allowing the Acts to be performed, filmed and distributed. A similar balancing exercise was present in the considerations for female genital mutilation, where the following sentiment was expressed:[232]

> We note that some women do not consider the practice to be mutilation and may have positive experiences from it. However, we believe that the negative implications of female genital mutilation, both physical and psychological, outweigh any positive experiences.

Therefore, I propose that statutory reform in this area is not too paternalistic, but rather necessary. In the absence of such reform, the status quo will continue to permit and legitimise the harm.

D Drafting and Interpretation Problems with the Proposed Offence

I admit that there are drafting and interpretation issues with the offence I propose, particularly defining the precise ambit of the Acts and what it means to intend to circulate the material. There is also the question of the penalty the crime should carry.[233] Parliament already

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[230] At 200.
[231] Helen Hall "Exorcism, Religious Freedom and Consent: The Devil in the Detail" (2016) J Crim Law 241 at 242.
[232] Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019 (194-2).
[233] Bruce Robertson and Jeremy Finn, above n 197, at [CA20.12].

recognises that some of the Acts upon which this dissertation is focused are more harmful than others. This is evidenced by the varied penalties that these Acts carry, under the Crimes Act, when they are performed without consent. Therefore, it would be a matter for Parliament to determine the penalty for the new offence. Furthermore, it is necessary to ascertain whether there would be any exceptions or additions, as the Acts listed are not exhaustive. Nevertheless, despite these drafting and interpretation problems with my proposed offence, it is suggested the Acts should be criminalised due to the harm they cause.

F Is this an Issue Best Left to Parliament?

Although common law developments can be effective, it is likely that the removal of the defence is an issue best left to Parliament. Such sentiment was shared by the court in *R v Barker* where it suggested that the parameters of consent are a matter better dealt with by Parliament than the courts. This recommendation was founded on the proposition that Parliament can more effectively ascertain the circumstances in which the defence should be withdrawn.[234] A further appeal of statutory reform is that the offence would be codified, thus it would prevent the need for the complainant to take their case to the Police, and for the Police to present the case to a court for change to be made in the common law. This is especially advantageous when the socio-economic and exploitative situations that these women are in may prevent them making such a complaint. In that case, the harm would go unpunished and the issue would remain untouched. Therefore, I propose that Parliament should recognise the harm in this area and codify the withdrawal of the defence.

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[234] *R v Barker,* above 31, at [121].

VI Chapter 6: Conclusion

It is clear that consent as a defence to assault is a convoluted area of law. Issues relating to personal autonomy, harm to society and paternalistic apprehensions are common considerations in this area. It is therefore imperative that any proposed limitations on consent must be clearly justified for the Courts and Parliament to remove the defence. I have argued throughout this dissertation that limitations on the defence are indeed justified and absolutely necessary. The law must protect the women involved in the production of these films, and women as a group, and society, from the harm caused by the Acts which are the focus of this dissertation**.** The law in this sphere has already recognised that limitations in this area are necessary by placing limits on the autonomy of millions of viewers worldwide. However, I have argued that it is necessary to regulate the production of this violent material to prevent harm occurring at its inception.

In general, this dissertation also raises questions as to the adequacy of the New Zealand legal position on consent as a defence to assault. Although it is an extremely difficult and convoluted task to discern a full theory of consent,[235] it necessary to ensure that the defence operates in an appropriate way. This is to ensure that the defence serves to protect rather than maintain harm. I submit that, based on the conclusions reached in this dissertation, there is an inherent risk that the generality of the position in New Zealand (in certain contexts) does not protect victims from harm, but instead the *magical* operation of the defence allows them to be harmed.

Lastly, it raises concerns about the poverty of liberalism in this sphere. If allowing individual freedom means that harm is being endorsed for the benefit of a select few, at the cost of women as a group and of society as a whole, then such liberalism does not operate effectively in this context. In fact, if liberal objectives are to promote freedom[236] and equality, then achieving such objectives warrants the removal of the defence in this area.[237] These objectives can only be achieved if women as a group are no longer objectified as things that enjoy being exploited and dominated.[238] Such change is needed to create a more equal, just, safe and free society in New Zealand.

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[235] *R v Lee*, above n 8, at [262].
[236] David Dyzenhaus "John Stuart Mill and the Harm of Pornography" (1992) 102 (3) Ethics 534 at 536.
[237] At 539.
[238] At 539.

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