

## POLICE PHOTOGRAPHY AND PRIVACY: IDENTITY, STIGMA AND REASONABLE EXPECTATION

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In October 2010, Lisa Caripis attended a climate change rally at the Hazelwood coal-fired power station in Victoria's Latrobe Valley. Previous demonstrations saw protestors scale fences and chain themselves to machinery, and arrests had been made for trespass and assaulting police.<sup>1</sup> There were no arrests at the 2010 action but a police surveillance operation recorded 70 minutes of video footage, 124 minutes of aerial footage and seven still photographs. Lisa Caripis featured in that material and although no other details about her were recorded she complained to Victorian Privacy Commissioner, Helen Versey, that retaining those images contravened the *Information Protection Act 2000* (Vic) ('IPA') and the *Victorian Charter of Rights and Responsibilities 2008* (Vic) ('Victorian Charter'). Versey rejected the complaint,<sup>2</sup> provoking a review of that decision at the Victorian Civil and Administrative Tribunal ('VCAT') in July 2012.

*Caripis v Victoria Police* was the first Australian case in which the right to privacy was invoked against police photography in public space.<sup>3</sup> Traditionally, that which occurs in public is afforded little protection in privacy law. What one freely displays to the world rarely has the necessary 'private' quality. Recent European decisions under article 8 of the *European Convention on Human Rights* ('ECHR') however, have suggested that the location where an image is taken or the sensitivity of its contents are no longer the sole determining factors as to whether it falls under the purview of privacy law.<sup>4</sup> Judges are recognising that the

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1 'Police Arrest Vic Power Plant Protesters', *The Age* (online), 13 September 2009 <news.theage.com.au/breaking-news-national/police-arrest-vic-power-plant-protesters-20090913-fm2d.html>.

2 Letter from Helen Versey (Victorian Privacy Commissioner) to Lisa Caripis, 17 October 2011, 4.

3 *Caripis v Victoria Police (Health and Safety)* [2012] VCAT 1472 ('*Caripis*').

4 See, eg, *R (Catt) v Commissioner of Police of the Metropolis* [2013] EWCA Civ 192 [7] ('*Catt*'), where Moore-Bick LJ says:

'More recently, however, the courts have recognised that the position is not as simple as that. Even information of a public nature, such as a conviction, may become private over the course of time as memories fade, thereby enabling people to put their past behind them (see *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410); and the storage and use of personal information that has been gathered from open sources (e.g. public observation, media reports etc.) may involve an infringement of a person's rights under article 8(1) if it amounts to an unjustified interference with his personal privacy.'

aggregation of public information into a systematic profile can itself expose a very private picture.<sup>5</sup>

Those European judgments, which have complicated the division between ‘private’ and ‘public’, made their way into the Australian jurisprudence for the first time in *Caripis*.<sup>6</sup> However, that decision, along with the European precedent, raises acute questions of whether the harms generated by this type of surveillance are within privacy’s apprehension. This article therefore investigates the subject of the *Caripis* decision in more detail: photographic and video surveillance by police and its relationship to privacy law. A history of judicial photography is presented as a lens for analysis of contemporary Continental European, English (and Australian) privacy jurisprudence. Through that investigation, it will be argued the application of European style doctrine, including the ‘reasonable expectation of privacy’ test, is problematic in the context of governmental photographic retention cases. In particular, it is suggested that the harm of that type of surveillance emanates from its relationship to archives and databases more than a violation of the ‘private sphere’ or the revelation of sensitive information. If the effects of judicial photography’s relationship to the archive can thus be described as becoming ‘painfully known or presumptuously categorised’,<sup>7</sup> other legal regimes, such as data protection (which was explored in *Caripis*), may offer useful alternatives for protecting individuals.

## I POLICE PHOTOGRAPHY AND PRIVACY LAW

Police (or judicial) photography has a history almost as long as the photographic image.<sup>8</sup> Mugshots of Belgian prisoners have been dated as far back as 1843,<sup>9</sup> only a few years after the invention of the daguerreotype process,<sup>10</sup> and the idea that surveillance cameras would sweep city streets was postulated as early as 1869.<sup>11</sup> But the regulation of police surveillance through privacy law

5 *Segerstedt-Wiberg v Sweden* [2006] VII Eur Court HR 87 (‘*Segerstedt-Wiberg*’), where judges acknowledged that the use a state makes of personal information collected in public may involve interferences with privacy, especially if the information is systematised and placed on a database. Similar conclusions were also reached in *PG and JH v United Kingdom* [2001] XI Eur Court HR 195 (‘*PG*’) and *S and Marper v United Kingdom* [2008] Eur Court HR 1581 (‘*Marper*’) where the Court indicated that the mere storing of information can implicate private life, with the subsequent use having no bearing on that finding.

6 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2) (‘*Victorian Charter*’) permits the interpretation of foreign case law; a similar provision exists in *Human Rights Act 2004* (ACT) s 31(1).

7 George Kateb, ‘On Being Watched and Known’ (2001) 68 *Social Research* 269, 278.

8 The term ‘Judicial Photography’ was coined by Alphonse Bertillon in his book *La Photographie Judiciaire* (Gauthier-Villars, 1890).

9 Andre A Moenssens, *The Origin of Legal Photography* (2004) The Forensic Scientist <[http://www.quincy.ca/timelines/t\\_legalphoto.html](http://www.quincy.ca/timelines/t_legalphoto.html)> (first published 1962).

10 Quentin Bajac, *The Invention of Photography: The First Fifty Years* (Ruth Taylor trans, Thames & Hundson, 2002) 17–18 [trans of *L’Image Révélée L’Invention de la Photographie* (first published 2001)] in which it is explained that Daguerre perfected his process in 1837 but did not announce it until 1939.

11 ‘The Legal Purposes of Photography’ (1869) 13 *Solicitors’ Journal & Reporter* 425, 425.

only became a possibility with the emergence of post-war international human rights instruments that included a right to private life. For example, article 8 of the *ECHR*, which stipulates:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of rights and freedoms of others.<sup>12</sup>

Through that regime, privacy law applied to the practice of police photography (in Europe) for the first time in 1973.<sup>13</sup> But privacy's relationship with the camera goes back much further. The dry plate process,<sup>14</sup> instantaneous photography, and the Eastman Kodak 'snap' camera all emerged around the end of the nineteenth century, facilitating both surreptitious photography and the chance to catch people in the act.<sup>15</sup> Newspapers enthusiastically adopted those technologies not only to illustrate stories but also expose scandal. It was therefore unsurprising that, by 1890, Warren and Brandeis argued for 'a right to be left alone,' reacting to a new reality that 'instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life.' They feared 'what is whispered in the closet shall be proclaimed from the mountain tops.'<sup>16</sup> In many jurisdictions, including England and Australia, privacy law's relationship to the image is extrapolated from that point: Warren and Brandeis' identification of the conflict between individual freedom and freedom of the press.<sup>17</sup> As such it focused on preventing the *disclosure* of images by media institutions without consent.

Although often read as an attempt to disentangle privacy from property, that conception of privacy retained a class dimension. Robert Post has argued that:

Warren and Brandeis wrote their famous article because Warren, a genuine Boston Brahmin, was outraged that common newspapers had had the effrontery to report

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12 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) and by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, ETS No 194 (entered into force 1 June 2010).

13 *X v United Kingdom* (European Court of Human Rights, Commission, Application No 5877/72, 12 December 1973).

14 Bajac, above n 10, 127. This allowed photographs to be taken outside of a studio and images to be developed at the creator's leisure.

15 Jennifer L Mnookin, 'The Image of Truth: Photographic Evidence and the Power of Analogy' (1998) 10 *Yale Journal of Law & the Humanities* 1, 12.

16 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 195.

17 It is worth noting that the 1888 case of *Pollard v Photographic Company* (1888) 40 Ch D 345, which Warren and Brandeis drew on, was decided before their article. However, that case conceptualised the rights at issue less in terms of privacy and more as breach of contract and confidence.

on his private entertainments. As such the class content of the privacy norms advanced by the article is plain.<sup>18</sup>

That argument is bolstered by the fact that while privacy rights were being formulated to preserve middle class personality from photographic intrusion, no equivalent emerged for the working classes who were also being surreptitiously documented. For example, Paul Martin, pioneer of ‘concealed’ London photography, and others freely engaged in ‘middle class social adventurism’,<sup>19</sup> intruding on the lives of the downtrodden, the ‘abnormal’ and the desperate in the name of art. That no coterminous privacy right for the homeless and lower classes developed intimates privacy’s privileging of personal property and its exemplar, the home.

Privacy’s historical focus of the home also protected individuals from ‘intrusion on seclusion’. That invocation is derived from the laws of Ancient Rome wherein the citizen was seen to exist prior to the state, with the home thus offering a space of private dominium.<sup>20</sup> A more ‘modern’ reading of that principle can be found in the famous 1765 case of *Entick v Carrington*,<sup>21</sup> after which William Blackstone commented, ‘the law has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle.’<sup>22</sup> *Entick* was subsequently adopted by American judges and translated into a protection of individuals from governmental intrusion as reified in the *United States Constitution*’s Fourth Amendment regulation of ‘search and seizure’<sup>23</sup> and general right to privacy.<sup>24</sup> That limitation on governmental action eventually returned to Europe as the protection from public authorities in article 8 of the *ECHR*. Embedded in that European reappropriation was the ‘reasonable expectation of privacy’ test, which because of its ingrained connection to

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- 18 Robert C Post, ‘The Social Foundations of Privacy: Community and Self in the Common Law Tort’ (1989) 77 *California Law Review* 957, 976; see also Raymond Wacks, *Privacy: A Very Short Introduction* (Oxford University Press, 2010) 53, where he argues Warren wrote the article in response to the presence of the unwelcome ‘yellow press’ at his daughter’s wedding.
- 19 Referring to the *flâneur*: Susan Sontag, *On Photography* (Penguin, 1977) 55; see also Christa Ludlow, ‘“The Gentlest of Predations”: Photography and Privacy Law’ (2006) 10 *Law Text Culture* 135, 138, citing Jacob A Riis, *How the Other Half Lives* (Bedford/St Martin’s, 1890), and photographers Paul Martin, Eugene Atget and Harold Cazneau.
- 20 See Berbarido Periñán, ‘The Origin of Privacy as a Legal Value: A Reflection on Roman and English Law’ (2012) 52 *American Journal of Legal History* 183, 189–90.
- 21 (1765) 19 How St Tr 1029 (*Entick*).
- 22 William Blackstone, *Commentaries on the Laws of England in Four Books* (Oxford, 1765–1769) vol 4, 223.
- 23 See *Boyd v United States*, 116 US 616 (1886) which, following *Entick*, held that a search and seizure was equivalent to ‘a compulsory production of a man’s private papers’.
- 24 Derived from a combination of constitutional amendments, this right was expressed in the cases *Griswold v Connecticut*, 381 US 479 (1965) and *Lawrence v Texas*, 539 US 558 (2003).

property, focused predominantly on the ‘home’ and its attendant categories such as family, communications, sexuality, and the body.<sup>25</sup>

Rather than balancing individual privacy rights against freedom of the press, privacy in this context balanced individual liberty against the requirements of an effective state.<sup>26</sup> In the context of police surveillance, it therefore applies in situations where authorities intrude into the private sphere without permission or a warrant, and (unlike the misuse of private information doctrine that limits disclosure) prohibits the *collection* and *retention* of certain information.<sup>27</sup> In the contemporary legal environment, that protection naturally extends to images and photographs, and increasingly to images collected in public.

David Rolph has discussed the epistemological shift in the common law’s treatment of photography that enabled consideration of images collected in public. From the starting point in *Entick* that ‘the eye cannot, by the laws of England be guilty of a trespass’,<sup>28</sup> Rolph tracks a juridical progression away from treating the human eye and camera as equivalent (with the consequence that what one can see one can photograph) to an acknowledgment that the camera has unique ways of ‘seeing’, capable of generating its own ‘wrongs’.<sup>29</sup> For Rolph, the foundation of that movement is privacy’s constitutionalisation as a human right,

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25 Early American intrusion cases therefore asked whether government had physically intruded into a person’s home or business or had seized his personal papers or effects. That changed somewhat with the wiretapping case of *Katz v United States*, 389 US 347 (1967), which espoused the principle that privacy ‘protects people, not places’. However, many argue the privileging of personal security over property still elevated *place* above other factors when considering the reasonableness of the privacy expectation (at 389), and Justice Scalia’s majority judgment in the recent case of *United States v Jones*, 132 S Ct 945 (2012) reiterates the importance of location when finding police trespass on private property constituted a ‘search’ for the sake of the Fourth Amendment.

26 Note that in the US and other countries, like Canada and now New Zealand, there is an intrusion on seclusion tort available against intrusion by private parties. However the US Constitutional right is aimed at the state.

27 That misuse of private information tort is heavily based on the longstanding common law doctrine of breach of confidence that developed in the commercial context in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Traditionally, claimants could not argue that the defendant was not entitled to be in possession of the information, only if it were copied or misused for the defendant’s own purposes. In the 1990 case of *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, that was extended to the collecting of information without consent, and reiterated in the recent case of *Imerman v Tchenguiz* [2011] 1 All ER 555 where Neuberger LJ (bringing the confidence jurisprudence more in line with the article 8 case law) said at [68]:

‘If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, *a fortiori*, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence.’

In *Campbell v MGN Ltd* [2004] 2 AC 457 (‘*Campbell*’), breach of confidence was extended to incorporate the right to private life, meaning the tort of misuse of private information has become part of the law of confidence in the UK. Note that in the US, these privacy principles only apply to the collection of information as the fourth amendment protects against ‘searches’ which excludes retention.

28 (1765) 19 How St Tr 1029, 1066.

29 David Rolph, ‘The Mechanical Eye: Looking, Seeing, Photographing, Publishing’ in Geoffrey Sykes (ed), *Courting the Media: Contemporary Perspectives on Media and Law* (Nova Publishers, 2010) 75, 79.

which interrupted its connection to private property. But beyond privacy's evolution from property right to human right, I argue the shifting boundary between permissible and impermissible photographic observation is linked to the harms associated with the state's instrumentalisation of image-making. In other words, it is argued that privacy reacted, perhaps at the expense of its own conceptual integrity, to photography's capacity to betray identity and produce its subject as criminally suspect, rather than from a more developed understanding of the camera.

To that end, as the common law developed, European judges have found offence to private life not because something 'intimate' or 'sensitive' has been exposed, nor because secluded space was intruded into, but because in the eyes of the state a person is no longer 'anonymous',<sup>30</sup> their identity has been profiled,<sup>31</sup> or they have been unreasonably treated like a criminal suspect.<sup>32</sup> This metamorphosis resulted from applying privacy law to a state practice whose history is entirely distinct from the practices privacy developed to proscribe. The best way to understand privacy's evolution in this context, and indeed its limitations, is thus to understand judicial photography's remarkable history in the production of the particular harms and injuries, against which the law now applies.

## II HISTORICAL HARMS OF JUDICIAL PHOTOGRAPHY

Many scholars have eloquently expressed the harms of persistent observation and surveillance by states. Often they elaborate or extend Michel Foucault's observations on the panopticon prison, particularly the use of visibility as a mechanism of disciplinary power and self-subjugation.<sup>33</sup> In this way surveillance is linked to privacy's concern for defending individuality and personhood against a normative state apparatus. But in this article I focus on a narrower field of surveillance practices – camera surveillance by state authorities, generally in the context of arrest, criminal investigation, and (warrantless) monitoring of public situations like protests.<sup>34</sup> While the discussion of harms produced by general surveillance is captivating, a historical exploration of this type of judicial photography reveals a more specific expression of the injuries it produces.

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30 *LF v Austria* (European Court of Human Rights, Application No 15225/89, Commission, 30 November 1992).

31 *Perry v The United Kingdom* [2003] VI Eur Court HR 141 ('Perry').

32 *Marper* [2008] Eur Court HR 1581; *R (on the application of RMC) v Metropolitan Police Commissioner* [2012] 4 All ER 510 ('RMC').

33 For example, Foucault says '[h]e who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power ... he becomes the principle of his own subjection': Michel Foucault, *Discipline and Punish* (Alain Sheridan trans, Vintage Books, 2<sup>nd</sup> ed, 1995) 201 [trans of: *Surveiller et Punir* (first published 1975)].

34 This generally excludes CCTV surveillance which in its normal guise is unlikely to offend privacy. See, eg, *Peck v United Kingdom* [2003] I Eur Court HR 123.

As photography developed through the 19<sup>th</sup> century it became a medium of bourgeois self-identity. Collecting portraits and having one's picture taken became enlightened gestures.<sup>35</sup> At the same time, however, photography also served an epistemic and repressive function based on its 'objective' character. As Peter Hargraves and Roger Hamilton argue in their book, *The Beautiful and the Damned*,

we see a counterpart to the social portraiture of leading (and less exalted) figures of the age in the anthropological, medical, and judicial portraits designed to record, classify and control subject races, degenerate bodies and deviant individuals.<sup>36</sup>

The belief that images were a source of knowledge endowed photography with an instrumental character perfect for criminal identification and the administration of justice.

Identifiable criminal images prevented recidivism. With judicial portraiture, individuals unknown to officials could less easily represent that they were first time offenders, enabling judges to accord 'proper' treatment.<sup>37</sup> The success of that photographic application was evident in Britain's passing of the *Habitual Criminals Act 1869*,<sup>38</sup> later replaced by the *Prevention of Crimes Act 1871*,<sup>39</sup> which in the Victorian tradition of categorisation and class division established a photographic register of the 'dangerous classes'.<sup>40</sup> One might say in doing so it also constructed the law-abiding body and class, ensuring the relative position of its subjects. That effect may have informed the proto-privacy protections extant in regulations under the British *Penal Servitude Act 1891* stipulating that untried criminals should not be photographed, and if they were photographed but subsequently acquitted, all photographs, measurements and fingerprints should be destroyed.<sup>41</sup>

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35 'Photography' (1864) 116 *The Quarterly Review* 482, 483 where the author says: 'There is scarcely an educated lady, fashionable or unfashionable, whose table is not adorned with the album of cartes de visite, containing a full allowance of royalties, half-a-dozen leading statesmen, and a goodly row of particular friends'.

36 Peter Hamilton and Roger Hargraves, *The Beautiful and the Damned* (Lund Humphries, 2001) 63.

37 See, eg, James Gardner, 'Photography as an Aid to the Administration of Criminal Justice', *The Times* (London), 29 December 1854, 9 who had begun taking photographs of certain groups of prisoners such as 'strangers to the city.' He gave an example of the effectiveness of judicial photography:

J H came to into the Bristol gaol upon commitment for trial, a perfect stranger to me and my officers; he was well attired but very illiterate, the state of his hands convinced me that he had not done any hard work, whilst the superiority of his apparel over his attainments led me to suspect that he was a practiced thief. I forwarded his likeness to several places, and soon received information that he had been convicted in London and Dublin. The London officer who recognised him by his portrait was subpoenaed as a witness, picked him out from amongst thirty or forty other prisoners, and gave evidence on his trial in October last, which led the Recorder to sentence him to six years' penal servitude.

38 *Habitual Criminals Act 1869* (UK) 32 & 33 Vict, c 99.

39 *Prevention of Crimes Act 1871* (UK) 34 & 35 Vict, c 112.

40 *Ibid* s 6.

41 *Penal Servitude Act 1891* (UK) 54 & 55 Vict, c 69.

Nevertheless, these criminal registers continually accrued images but with only limited means of retrieving them.<sup>42</sup> Sifting through thousands of images to identify an individual became increasingly impracticable. French police official Alphonse Bertillon recognised the critical concern of judicial photography was not the creation of a perfect likeness but the creation of a photographic system capable of classification and comparison. Bertillon believed ‘the whole range of knowledge that the police had gathered was insufficiently structured and correlated’,<sup>43</sup> and he remedied this by introducing an index system of descriptions. By focusing on specific ‘signaletic’ measurements of the adult body, photographic subjects could be classified and described through text. It was the first system in which images and their subjects were reduced to data for the sake of identification. Bertillon’s system enabled accurate description of individuals according to their unique measurements, allowing retrieval of images systematically filed away. Judicial photography combined with systems of comparison thus became a powerful way of identifying individual criminals. Equally significant, however, was the technology’s application to ‘criminality’ and the deviant classes more broadly.

In *The Burden of Representation*, John Tagg argues there was a symbiotic development of photography and national police forces.<sup>44</sup> He says in order for policing to be effective it required ‘an instrument of permanent, exhaustive, omnipresent surveillance, capable of making all visible’.<sup>45</sup> For Foucauldians like Tagg, this was a process of extending the emerging practices of observation-domination beyond institutions like prisons and penitentiaries. The deployment of photography in the taxonomy of knowledge and as an instrument of power thus became a way of knowing criminals and criminality, not simply individual offenders, but the groups that comprised the criminal classes.

It has been argued this social scientific imperative of ‘knowing’ criminality evolved from the use of photography in anthropology.<sup>46</sup> Indeed the anthropological lineage of the contemporary mugshot is evident in the 1869 proposal of J H Lamprey, Secretary of the London Ethnographical Society, that practitioners photograph their subjects against a background grid of approximately 5 centimetres squared to overcome difficulties in comparison.<sup>47</sup> Consequently, those Lamprey Grid images provide a stunning historical prefiguration of contemporary police portraits.

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42 By 1873 more than 43 000 images had been collected but only a handful had been useful in the identification of re-offenders: Charles Dickens, *All the Year Round* (Chapman and Hall, 1873) vol 11, 11–12.

43 Jens Jäger, ‘Photography: A Means of Surveillance? Judicial Photography, 1850 to 1900’ (2001) 5(1) *Crime, History & Societies* 27, 37.

44 John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (MacMillan Education, 1988) 74.

45 Ibid 72.

46 See, eg, Christopher Pinney, *Photography and Anthropology* (Reaktion Books, 2011); Daniel Pick, *Faces of Degeneration: A European Disorder, c 1848 – c 1918* (Cambridge University Press, 1989).

47 Pinney, above n 46, 28.



Informing that anthropological, or more specifically criminological, use of photography in the 19<sup>th</sup> century were the pseudo-sciences of physiognomy and phrenology. These ‘arts’ supposed that the face, through its representations of the ‘four humours’, was a sort of *mask* that when read correctly gave true insight into a subject’s nature.<sup>48</sup> Physiognomic investigation of degeneracy, race and the lower classes absolutely included the criminal body, and as early as 1846, photography and phrenology had been combined in a book on ‘criminal jurisprudence’.<sup>49</sup> By the 1860s, shortly after the publication of *The Origin of Species*, criminology had totally appropriated Social Darwinism’s quest ‘to chart every manifestation, every structure of the pathological’.<sup>50</sup> Through recognising features of atavism, backwardness, and deviance within the human face and head, photography was deployed ‘objectively’ to justify a positivist biological fatalism and criminal pathology.<sup>51</sup>

Francis Galton (a cousin of Charles Darwin) was one such social scientist to adopt the determinist approach. In 1877 he used a composite methodology of re-photographing portraits of criminals on the same plate in an attempt to demonstrate a photographic mean or type.<sup>52</sup> Galton’s photographic project, which involved a profoundly ideological biologisation of class relations,<sup>53</sup> was of course a failure, however he was not alone in his effort to biologise the criminal delinquent. Others like the famous Italian criminologist, Cesare Lombroso,<sup>54</sup> also worked towards the identification of biological criminals in order to anticipate delinquency and legitimate the proposed practice of preventative detention.<sup>55</sup>

Two distinct consequences therefore arise from the practice of police photography. First, images enter police databases where they are systematised,

48 Sharrona Pearl, *About Faces: Physiognomy in Nineteenth Century Britain* (Harvard University Press, 2010) 102.

49 See Marmaduke B Sampson, *Rationale of Crime: Marmaduke B Sampson’s ‘Treatise on Criminal Jurisprudence Considered in Relation to Cerebral Organisation* (Patterson Smith, first published 1846, 1973 ed), where Matthew Brady accepted a commission to photograph prisoners in New York City’s Blackwell’s Island Prison.

50 Pick, above n 46, 138.

51 Ibid 114, discussing Lombroso’s criminal science.

52 Francis Galton, ‘Composite Portraits, Made by Combining Those of Many Different Persons into a Single Resultant Figure’ (1879) 3 *Journal of the Anthropological Institute of Great Britain* 132.

53 Allan Sekula, ‘The Body and the Archive’ (1986) 39 *October* 3, 42.

54 A founding practitioner of criminal anthropology, Lombroso was desperate to identify the difference between criminals and the insane, and repeated Galton’s technique in his famous analysis of criminal skulls. In his text, *L’Uomo Delinquente*, 18 skulls were combined to expose the essential cranial features of the delinquent. A well-known extract reads as follows:

This was not merely an idea, but a revelation. At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal – an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals. Thus were explained anatomically the enormous jaws, high cheek bones, prominent superciliary arches, solitary lines in the palms, extreme size of the orbits, handle-shaped ears founding criminals savages and apes, insensibility to pain, extremely acute sight, tattooing, excessive idleness, love or orgies, and the irresponsible craving of evil for its own sake, the desire not only to extinguish life in the victim, but to mutilate the corpse, tear its flesh and drink its blood.

55 Pick, above n 46, 128.

individuated and identified; images become associated with actual human beings represented in bureaucratic filing systems.<sup>56</sup> Second, the subject becomes defined as a member of the subnormal classes, produced as a criminally suspect object of knowledge, and inscribed in a hierarchical system of social relations described by Alan Sekula as ‘The Archive’.<sup>57</sup> This bureaucratic complex established the terrain of ‘the other’, and defined ‘both the *generalised look* – the typology – and the *contingent instance* of deviance and social pathology.’<sup>58</sup> To be photographed by police meant being interpreted, and even constructed, as criminal.<sup>59</sup>

### III POLICE PHOTOGRAPHY IN PUBLIC PLACES: THE EVOLUTION OF PRIVACY JURISPRUDENCE

The following section examines how over the past 40 years the harms identified above have manifested in the case law dealing with police photography in public. It is argued the jurisprudence demonstrates a wavering trajectory from treating police images like the ‘private’ images Warren and Brandeis were concerned about, towards treating police images like ‘personal information’ in databases. While that progression in privacy law may be considered beneficial, data protection may be a more comfortable regime for dealing with police photography’s historical implications. Privacy as a concept is undoubtedly bonded to this type of surveillance, both through its doctrinal connection with the image and its liberalist alliance to the idea of limited government. However, for privacy to assuage the consequences of police photography, judges have had to modify or abandon traditional privacy understandings, in particular the test of reasonable expectation of privacy. That process has taken a number of years from the first article 8 decision in 1973 of *X v United Kingdom*,<sup>60</sup> where no privacy violation was found on the traditional tests, to the 2013 case of *R (Catt) v Commissioner of Police for the Metropolis*,<sup>61</sup> wherein private life was infringed despite acknowledgment that the complainant had no reasonable expectation of privacy.<sup>62</sup>

In *X*, a protestor at a Britain versus South Africa rugby match was arrested, forcibly restrained and photographed against her will for demonstrating against

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56 Being one definition of ‘identification’ according to Roger Clarke: Roger Clarke, *Smart Card Technical Issues Starter Kit* (Xamax Consultancy, 1998) 14.

57 Sekula, above n 53, 6.

58 Ibid 7.

59 Katherine Biber has extensively explored the connection between image and truth in her book *Captive Images: Race, Crime, Photography* (Routledge-Cavendish, 2007) where she considers the image’s role in the construction of identity. But those deeper questions of the relationship between image, verification, and human perception embedded in the critical analysis of the image’s use in evidence, go beyond the scope of the argument in this article.

60 *X v United Kingdom* (European Court of Human Right, Commission, Application no 5877/72, 12 December 1973) (‘*X*’).

61 *R (Catt) v Commissioner of Police of the Metropolis* [2013] EWCA Civ 192 (‘*Catt*’).

62 Ibid [28].

South Africa's apartheid policy. Police informed her that the images would be kept for future reference in case she caused trouble again. X argued that retention violated her article 8 rights,<sup>63</sup> but the Commission found the application inadmissible for three reasons: first, 'there was no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there,' second, 'the photographs related to a public incident in which she was voluntarily taking part,' and third, 'they were taken solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose'.<sup>64</sup>

These arguments, reflecting the tests previously applied in *disclosure* of private information cases, represent the starting position of the public/private divide in this context. The Commission had no concept of how images neither revealing anything 'private' nor intimate, taken in public, and not made publicly available, could interfere with the protected realm. The fact that X was identified, with her personal details being recorded along with her image, was of no consequence. The focus remained on the location the images were collected (outside the home), and the quality of the information captured (in this case nothing sensitive nor intimate). Retention was irrelevant because the information was *prima facie* public.

### A Identification and Systematisation

That remained the legal position for some time, but the 1995 decision of *Friedl v Austria* foreshadowed that identifying innocent subjects with a police photograph could implicate private life.<sup>65</sup> There, Ludwig Friedl was photographed by police during an operation to vacate a homelessness-awareness protest site. Although the European Commission concluded that there had been no 'intrusion' into the 'inner circle' of Friedl's private life, the finding against a privacy violation placed greater emphasis on the fact that his image had not been processed or 'identified':

In this context, the Commission attaches weight to the assurances given by the respondent Government according to which the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.<sup>66</sup>

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63 She also contended that she suffered even more egregious treatment than would be the case were she charged and acquitted because the images would have had to be destroyed according to the still in force *Regulation for Measuring and Photographing of Prisoners 1896* (UK) no 762.

64 *X v United Kingdom* (European Court of Human Right, Commission, Application no 5877/72, 12 December 1973) [2].

65 *Friedl v Austria* (European Court of Human Rights, Application No 15225/89, Chamber, 31 January 1995) ('*Friedl*').

66 *LF v Austria* (European Court of Human Rights, Application No 15225/89, Commission, 20 November 1992), [50].

After the Commission found no violation, the issue was referred to the European Court of Human Rights but settled in favour of the complainant before being heard, resulting in compensation and the images being destroyed. Explicit proscription of using police images to identify individuals then eventuated in the 2003 case of *Perry v The United Kingdom*.<sup>67</sup> There, a police ploy to record a man that refused to attend witness identification parades with a custody suite camera violated article 8. Again, there was an acknowledgment that the recording did not intrude on the ‘inner circle’ of Perry’s private life,<sup>68</sup> but the court was more concerned that, while ordinary use of security cameras did not raise privacy issues because they serve a legitimate and foreseeable purpose, Perry certainly did not expect the footage taken of him to be used for the purpose of identification. However, accommodating identification and data processing into privacy law’s cognisance thus required relocating the ‘reasonable expectation of privacy’ test away from the *quality* of the information captured, and towards its *use* by public authorities.<sup>69</sup> In doing so, the test of reasonable expectation abandoned its concern with ‘what individuals seek to preserve as private’.<sup>70</sup>

The violation of privacy through ‘systematisation’, for example through the creation of profiles, also developed around the same time. Although not in a photographic context, the cases of *Amman v Switzerland*,<sup>71</sup> *Rotaru v Romania*,<sup>72</sup> *PG v The United Kingdom*,<sup>73</sup> and *Segerstedt-Wiberg v Sweden*,<sup>74</sup> suggested private life considerations arise once any systematic or permanent record of material from the public domain comes into existence.<sup>75</sup> Underpinning those cases was the idea that individuals not having committed crimes should not

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67 *Perry* [2003] VI Eur Court HR 141.

68 *Ibid* [33].

69 The relationship between public image and private life also forged a strong bond outside of the context of police files. See, eg, cases like *Campbell* [2004] 2 AC 457, where Naomi Campbell sued for publication of an image of her attending a Narcotics Anonymous meeting, and *Von Hannover v Germany* [2004] VI Eur Court HR 41, a case concerning the relentless publication of paparazzi images of the Princess of Monaco, which cultivated the principle that controlling one’s image was part of the right to privacy. The key feature of these decisions, well expressed by Lord Nicholls of Birkenhead in *Campbell* was that ‘[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy’: at [21]. ‘Reasonable expectation’ had become the lynchpin for determining the realm of the private when it came to *disclosing* images captured in public but it still revolved around the quality of the information – that is, what the image revealed. However, *Reklos v Greece* [2009] Eur Court HR 200 appeared to extend the protection of images to controlling images at the point of collection because images were considered such a chief attribute of personality. In that case, consent was required when the picture was taken and not simply if and when it is published regardless of whether the image exposed a ‘private’ aspect of one’s life: at [40]–[41].

70 See *Katz v United States*, 389 US 347 (1967) 361 (Harlan J).

71 *Amann v Switzerland* [2000] II Eur Court HR 245 (‘*Amann*’).

72 *Rotaru v Romania* [2000] V Eur Court HR 109 (‘*Rotaru*’).

73 [2001] XI Eur Court HR 195 (‘*PG*’).

74 *Segerstedt-Wiberg* [2006] VII Eur Court HR 87.

75 See, eg, *PG* [2001] XI Eur Court HR 195, [57].

necessarily be the subjects of police observation, however some judges still struggled to see how non-private information could affect private life.<sup>76</sup>

## B Stigmatisation

In the photographic context, privacy as protection from stigmatisation clearly undergirded the English breach of confidence decision in 1994 of *Hellewell v Chief Constable of Derbyshire*.<sup>77</sup> There, images used in police investigation, at least images created in the context of arrest, were found to have the necessarily quality of ‘confidence’ to enliven a breach of confidence action, with Laws J noting ‘[s]uch a photograph will, as I have said, convey to anyone looking at it the knowledge that its subject is or has been known to the police. That is not what I may call a public fact.’<sup>78</sup>

Some years later, stigmatisation was explicitly acknowledged in the influential case of *Marper*;<sup>79</sup> but to make it a relevant consideration in privacy law the language of reasonable expectations was abandoned altogether. In finding that that DNA profiles, cell samples and fingerprints of non-convicted persons could not be retained by police indefinitely, the Court noted of ‘particular concern’ was the risk of ‘stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons.’<sup>80</sup> Crucially, the ‘reasonable expectation of privacy’ test was not used in the assessment of whether the retention offended private life, with the Court preferring to base its decision on ‘the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.’<sup>81</sup> That approach more naturally accommodates information captured in public, both inside and outside the context of arrest, and was widely endorsed by the Strasburg Court, eventually being extended to photographs in the case of *RMC* discussed below.<sup>82</sup>

Those alternative approaches developed in the jurisprudence to recognise ‘identification’ and ‘stigmatisation’ have experienced a mixed reception. In the

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76 See, eg, the partially dissenting opinion in *Rotaru* of Bonello J who, while agreeing that the state’s recording practices were not ‘in accordance with the law,’ argued activities ‘which are, by their very nature, public and which are actually nourished by publicity, are well outside the protection of article 8’: at [3]. Asking how the storage of records of an individual’s public pursuits violates privacy, Bonello J reiterated that the protection of article 8 had until that point only protected confidential matters such as medical, sexual, family and possibly professional information, being intimate areas in which ‘public intrusion would be an warranted encroachment on the natural barriers of self’: at [6].

77 [1995] 4 All ER 473.

78 *Ibid* 478. Although a breach of confidence action was available the prevention of crime was a sufficient public interest defence to permit disclosure of those images to shop owners.

79 [2008] Eur Court HR 1581.

80 *Ibid* [122].

81 Marc Jonathan Blitz, ‘Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity’ (2004) 82 *Texas Law Review* 1349, 1436.

82 [2012] 4 All ER 510.

2009 case of *R (on the application of Wood) v Metropolitan Police Commissioner*,<sup>83</sup> the appellant, a media organiser for an association known as Campaign Against Arms Trade ('CAAT'), attended the Annual General Meeting of a company that organised arms industry trade fairs. Other CAAT members with prior convictions for unlawful activity against defence industry organisations were also in attendance, and police deployed a photographic unit to collect intelligence. After the meeting, Wood was conversing with one of the previously convicted CAAT protesters in a nearby hotel lobby where, according to evidence, an officer photographed him to establish his identity. The images were apparently intended for a searchable police database of activists' photographs described as 'spotter cards'.

Lord Justice Laws formulated two critical questions for addressing interferences with private life. The first was whether the assault to personal autonomy attained 'a certain level of seriousness', and the second, following the pre-*Marper* principle, was whether the claimant enjoyed on the facts a 'reasonable expectation of privacy'.<sup>84</sup> He noted that whether a reasonable expectation existed was determined by examining the police operation as a whole, from collection to actual and intended use (mirroring application in *Perry*). Thus, while finding that *merely* taking a photograph of someone in a public street is no interference with privacy, there are circumstances in which taking a photograph in public not merely engages article 8, but grossly violates it.<sup>85</sup> In this case:

The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business ... This action is a good deal more than the snapping of the shutter. The police are a state authority. ... [T]he appellant could not and did not know why they were doing it and what use they might make of the pictures.<sup>86</sup>

In *Wood*, invasive photography without explanation, coupled with the apprehended use of the images for 'spotter cards', generated an impact on the subject, unjustified by the purpose of the collection. However, the collection and retention were still evaluated through the optic of reasonable expectation, with a key issue being the requirement of going beyond simply generating an image. As a result those pictures were held distinct from photographs taken at a public demonstration or in the context of arrest, whereby it should be *expected* that authorities would take photographs.<sup>87</sup>

That distinction was rejected however in *RMC*, because *Wood* relied on decisions made before *Marper*, which meant it inappropriately relied on

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83 [2009] 4 All ER 951 ('*Wood*').

84 Ibid [22], where reliance was placed on Lord Nicholls of Birkenhead's suggestion in *Campbell* that the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.

85 Ibid [39].

86 Ibid [45].

87 Ibid [43].

reasonable expectations.<sup>88</sup> *RMC* dealt with the retention of mugshots after charges had been dropped and Richards LJ insisted that retention of photographs in police records engages article 8 despite what the pre-*Marper* decisions (that is, *X* and *Friedl*) say.<sup>89</sup> However, his Honour concluded that retention in that case violated article 8 *even* on the reasonable expectation of privacy test, without enunciating what other factors might be relevant.<sup>90</sup>

The latest English decision in this line is *Catt*,<sup>91</sup> where the applicant challenged the retention of his image and other data about his attendance at various protests in the National Domestic Extremism Database. As was the case in *Wood*, *Catt* had an association with a protest group, Smash EDO, for which disorder and criminality at protests had been a feature. At first instance, the divisional Court took as its starting point the observation of Nicholls LJ in *Campbell* that the touchstone of private life is ‘whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy’.<sup>92</sup> The Court also believed that that there was no real distinction between observations and reports compiled by members of the public who might be interested, such as journalists, and observations and reports prepared by the police.<sup>93</sup> With no difference between the tests applied for private persons and government, the Court found the assembly of material from public demonstrations in public places did not amount to privacy violation. Further, the applicant’s affiliation with Smash EDO was considered of intelligence value despite his age of 87 and good character.<sup>94</sup>

The appeal decision however, endorsed the *Marper* and *RMC* approaches, explicitly noting that while the applicant did not have a reasonable expectation of privacy,<sup>95</sup> ‘other considerations come into play in relation to the collection and retention of personal data by public authorities.’<sup>96</sup> Thus entry of *Catt*’s personal information into a searchable database implicated his privacy,<sup>97</sup> especially because it could not be shown that the information was of sufficient value to legitimate its continued retention.<sup>98</sup>

The references to ‘personal information’ and ‘personal data’ are significant and reflect an acknowledgment that the categories of information being dealt with are the same as those regulated by data protection. That said, the English *Data Protection Act 1998*<sup>99</sup> was not considered helpful to the applicant’s position

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88 *RMC* [2012] 4 All ER 510, 529 [36].

89 *Ibid* 528 [33].

90 *Ibid* 530 [37].

91 [2013] EWCA Civ 192.

92 *Ibid* [6].

93 *Ibid* [4].

94 *R (Catt) v The Commissioner of Police of the Metropolis* [2012] EWHC 1471 (Admin), [39].

95 *R (Catt) v The Commissioner of Police of the Metropolis* [2013] EWCA Civ 192, [28].

96 *Ibid* [30].

97 *Ibid* [31].

98 *Ibid* [44].

99 *Data Protection Act 1998* (UK) c 29.

and no arguments based on data protection were developed.<sup>100</sup> Alternatively, in the 2012 case of *Caripis*, both data protection and privacy law were brought to bear on the retention of images taken by police in Australia.

### C *Lisa Caripis v Victoria Police*

The *Caripis* decision came down after *RMC* and the first *Catt* decision, but before *Catt* was reversed on appeal. It also presented a factual situation somewhat distinct from *Catt* and *Wood* in that while images of the complainant were created, no other information (such as her name) was recorded, and no profile was created.

Information Privacy Principle ('IPP') 4.2 (established under the *IPA*) requires destruction of personal information if 'it is no longer needed for any purpose'.<sup>101</sup> While there was no issue establishing that the images in question fell under the data protection regime, the threshold for 'needed' was not considered onerous and the complainant's submission that 'needed' should be interpreted as 'indispensible' was rejected.<sup>102</sup> That meant Victoria Police's submissions that the images 'needed' to be retained for intelligence purposes and planning future protest responses were sufficient.<sup>103</sup> Further, because the Information Privacy Principles in the *IPA* were subordinated to any conflicting legislative provision, it was submitted by Victoria Police that the *Public Records Act 1973* ('*PRA*') also required retention for a prescribed period.<sup>104</sup> The *PRA* regime (including Standard PROS 10/14) specified the disposal procedures for various classes of police records,<sup>105</sup> and was summarised in the decision:<sup>106</sup>

Class	Description	Disposal Action
1.1.5	Evidence obtained through surveillance devices and telephone intercepts.	Temporary Destroy when required in accordance with the relevant governing legislation.
1.1.6	Records of evidence gathered during the investigation of crimes that are not incorporated into briefs of evidence. Includes audio visual records such as in car recordings and recordings of	Temporary Destroy when administrative use is concluded.

100 *R (Catt) v The Commissioner of Police of the Metropolis* [2013] EWCA Civ 192, [33].

101 *Information Privacy Act 2000* (Vic) sch 1 ('*IPA*').

102 *Caripis* [2012] VCAT 1472, [44].

103 Note the police argument that the material had to be kept as evidence in case of unlawful activity was dismissed because of the time that had passed since the event.

104 Under *Public Records Act 1973* (Vic) s 19, destroying records not in accordance with a standard made under s 12 constitutes an offence.

105 *Public Records Act 1973* (Vic) s 12.

106 *Caripis* [2012] VCAT 1472, [82].



	interviews.	
1.8.5	Records documenting ongoing assessment of the severity of threats made or considered to be posed by persons or groups including religious, ideological and issue related groups in relation to public order or an event.	Temporary Destroy 50 years after last action.
1.8.6	Records documenting non-ongoing (one-off) assessments of the severity of threats related to events. Includes threat assessments for planned events such as sporting, cultural or political events or planned protests.	Temporary Destroy 10 years after date of event.
10.2.1	Records documenting the planned Police response to events such as demonstrations, State funerals and annual sporting events and visits of prominent persons of public office. Includes operation orders, threat assessments, briefings and plans for Police presence and Police tactics including contingency plans. Also includes records of liaison with event organisers, pre event briefings, deployment and post event reviews.	Temporary Destroy 7 years after last action.

The complainant argued PROS 10/14 did not assist police because the material was to be disposed of ‘as soon as practicable’ under 1.1.5 or 1.1.6. But Steele considered those classifications inappropriate as 1.1.5 made tacit reference to the *Surveillance Devices Act 1999* (Vic) (which was not relevant in this case), and 1.1.6 was only applicable to material gathered during the investigation of a crime. Alternatively, Victoria Police contended the footage was best described by classes 1.8.5 or 1.8.6, but Steele again disagreed believing the footage was the raw material needing to be assessed rather than the records documenting assessment. In Senior Member Steele’s opinion, class 10.2.1 was the most appropriate, being a record of a planned Police response, thus necessitating retention for seven years. The Tribunal did accept however that if the material could not be classified according to PROS 10/14 it had to be retained indefinitely, as destruction would violate section 19 or the *PRA*.

Retention of the material recorded in the Latrobe Valley was thus determined as within the discretion afforded by the Information Privacy Principles in the *IPA* and PROS 10/14. Even the *Charter of Human Rights and Responsibilities Act*

2006 (Vic) (*Victorian Charter*), which dictates that IPP 4.2 be interpreted in a way that gives effect to the right to privacy, offered no additional protection.<sup>107</sup>

The privacy right in section 13 of the *Victorian Charter* states:

13. Privacy and Reputation

A person has the right

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.

Senior Member Steele, using the European article 8 authorities to interpret that provision, decided there was no privacy violation.<sup>108</sup> She saw the case in the same category as *Friedl* because, like that case, no names nor other data were recorded, and the images were not entered into a data processing system; and *Catt* (at first instance) because she saw the police action as justified. Steele acknowledged that ‘the recording of the data and the systematic or permanent nature of the record may give rise to [privacy] considerations’,<sup>109</sup> and that ‘the mere storing of data relating to the private life of an individual amounts to an interference’,<sup>110</sup> but she found nothing systematic about the recording of the complainant, and that no ‘private life’ information had been stored.

Steele also followed *Wood* in requiring a reasonable expectation of privacy to be contravened, but rejected such a finding because the protestors invited the taking and publication of photographs, and publicity for the event indicated images would be published online at *Flickr* and *350.org*. Steele also distinguished *Wood* because of the non-intrusive manner in which photographs were taken at the Hazelwood protest compared to the intrusive processes in that case. That is, she did not see the collection of images as ‘sufficiently serious’ an invasion because the footage never focused specifically on Caripis. Steele thus found the interpretation of IPP 4.2 ‘in its ordinary meaning, and for the purposes which I have found fall within that meaning, remains consistent with her privacy.’<sup>111</sup>

Several comments can be made about Steele’s reasoning before considering the broader implications of the decision. First, the Tribunal accepted the case of *Friedl* as unequivocally supporting the Police position,<sup>112</sup> without noting that the Austrian government settled with *Friedl*, agreeing to destroy the images and pay

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107 Note that the *Victorian Charter* does not offer a direct action for breach of privacy. Presently, the only direct ‘privacy’ action in Australia is breach of confidence. However, no breach of confidence action was brought, probably because the likelihood of success for that type of action was extremely low, and the process for enforcing the IPPs through the *IPA* was based on reviewing the privacy commissioner’s decision in VCAT.

108 See *Victorian Charter* s 32(2), whereby ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.

109 *Caripis* [2012] VCAT 1472, [55], quoting *Peck v the United Kingdom* [2003] 1 Eur Court HR 123, [59].

110 *Ibid* [57], quoting *Marper* [2008] Eur Court HR 1581, [67].

111 *Caripis* [2012] VCAT 1472, [68].

112 *Ibid* [53]–[54].

compensation. Second, Steele quite comfortably dismissed the complainant's reliance on *Von Hannover v Germany (No 2)*<sup>113</sup> as establishing that protection of one's image was part of the right to privacy because that case concerned the publication of images without consent.<sup>114</sup> However, she failed to acknowledge the case of *Reklos v Greece*,<sup>115</sup> where the protection of article 8 was extended to the mere taking of photographs without authorisation. Other important *ECHR* jurisprudence was also excluded from the reasoning, significantly *RMC*, which, while unlikely to affect the outcome, made a convincing argument that since *Marper* it was inappropriate to rely on the reasonable expectation of privacy test. *RMC* also extended the principle in *Marper* (that the mere storing of private life information is problematic even if no data processing occurs) to police photographs – somewhat undermining Steele's argument that *Marper* could be distinguished partly because of the types of information at issue in that case. Acknowledging the *RMC* principle would thus have pushed the category of information complained of in *Caripis* closer to the frontier between public and private, and highlighted the tentative status of 'reasonable expectations'. As such, it may have led to an acknowledgment that being recorded by police and having that image retained in a police file has greater implications for an individual than having the same image posted on *Flickr*.

#### D A New Mode of Regulation?

Beyond its now questionable judicial status, there are forceful arguments for abandoning reasonable expectations in the case of governmental surveillance. In particular, it may be inappropriate to apply the same test in both the private and state surveillance contexts. That is, the belief that public surveillance by police is acceptable because government officials are observing little more than what is available to private parties (an argument explicitly accepted in the first *Catt* decision) is problematic. Marc Jonathan Blitz, for example, has argued that whatever use private parties might make of a surveillance technique, they would find it difficult to construct as comprehensive a system as government would be capable of creating. Further, governments are capable of collecting and storing far more information, as well as being capable of doing far more damage with it. And finally, that it is incorrect to equate the balance between individual freedoms and freedom of expression to the balance between individual freedom and the needs of a democratic society (by using the same test for breach of privacy),

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113 (European Court of Human Rights, Grand Chamber, Applications Nos 40660/08 and 60641/08, 7 February 2012).

114 *Caripis* [2012] VCAT 1472, [52].

115 [2009] Eur Court HR 200.

particularly when those needs are organised around the notion of limited government.<sup>116</sup>

It could then be argued Steele's decision, because it used 'reasonable expectations', lacked nuance. Indeed Moore-Bick LJ managed to reach a different (and likely more appropriate) conclusion in *Catt* on the same available precedent. That said, the factual scenarios in *Catt* and *Caripis* were distinct (as no information other than image was recorded in the Australian case) which would mean finding a privacy violation would be breaking new ground again. But considering the relative immaturity of Australian privacy jurisprudence as well as the dearth of enforcement mechanisms, decision makers should be careful to synthesise principles accurately, especially in the context of this globally ascendant issue.

Although privacy doctrine did not assist *Caripis*, the primary action was one in data protection. Deploying data protection in this context speaks to the argument that the individual interests involved in this kind of police observation are not about 'privacy' at all because of its 'public' character,<sup>117</sup> but instead may be more about proper data management. Data protection developed through the 1960s and 1970s in response to the new possibilities of amassing, linking and accessing personal data, the growth in the amount of personal data held by various organisations, and the integration of those data holdings into centralised data banks.<sup>118</sup> The concept is thus ontologically geared towards archival and database processes.

However, regulating image-making through data protection has its own problems. For example, where privacy law is charged with assessing the quality of guiding legislation against the individual right, in *Caripis* the *IPA* was unquestioningly subordinated to the *PRA*.<sup>119</sup> To that end, it may have been an omission of Steele's to not assess the standards established under the *PRA* (PROS 10/14) against the privacy right in the *Victorian Charter*. That analysis may have been edifying, especially in light of the admitted possibility that if information created by police did not clearly fit any of the prescribed classes indefinite

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116 Blitz, above n 81, 1431–2. In *California v Ciraolo*, 476 US 207 (1986), Powell J in dissent recognised that difference in assessing the propriety of warrantless aerial surveillance of an individual's garden by police. The surveillance was deemed not to violate any reasonable expectation because commercial airliners follow the same flight path meaning the garden was visible to any passenger. However, Powell J argued there was a difference, noting commercial passengers only obtain a 'fleeting, anonymous, and non-discriminating glimpse of the landscape and buildings over which they pass', a prospect very different from the trained eye of targeted police surveillance, but not something to which the reasonable expectation test is sensitive: at 223.

117 William H Rehnquist, 'Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?' (1974) 22 *Kansas Law Review* 1, where he says privacy is not the issue because the observed action 'is not intended to be concealed or confidential and is not in fact concealed or confidential': at 9.

118 Lee A Bygrave, *Data Protection Law: Approaching its Rationale, Logic and Limits* (Kluwer Law International, 2002) 94.

119 Note that data protection has been constitutionalised as a fundamental right in Europe to some extent under the European Union: *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01, art 8.

retention was obligatory. Similarly, one might question whether the word ‘needed’ in IPP 4.2 along with the general ‘law enforcement’ exemptions in the *IPA*, would offer as much protection or guidance as the justification and proportionality requirements under article 8(2) of the *ECHR*.<sup>120</sup>

The use of data protection to regulate surveillance also accords with certain alternative ‘privacy’ visions for regulating these practices. One example is reconceiving privacy to embrace a ‘right to anonymity’.<sup>121</sup> That proposal effectively deals with the consequences of being identified when observed, but may not adequately address the harms of unreasonable observation itself, only the processing of captured data. For example, ‘upskirt’ photographs often leave subjects unidentifiable, but ‘the mode of taking those images can be extremely offensive’.<sup>122</sup> It also fails to address the issue of stigmatisation because images can be used indiscriminately in police files as long as they are not associated with names.

To that end, data protection, with animating concepts like ‘informational self-determination’,<sup>123</sup> is relevant even in situations like *Friedl* and *Caripis* where names and images are not recorded together because it applies to information about an individual ‘whose identity is apparent, or can reasonably be ascertained’.<sup>124</sup> That appears to include images,<sup>125</sup> including unidentified police photographs,<sup>126</sup> which speaks more directly to the harms occasioned from being the subject of police observation regardless of the subsequent use of the information collected. Alan Westin has argued the ‘[k]nowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas.’<sup>127</sup> Similarly, political theorist George Kateb argues one is harmed when observed by a surveillance camera ‘because one loses all possibility of innocence.’<sup>128</sup> Kateb

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120 See, eg, *Wood* [2009] 4 All ER 951, 981 [86] where, in relation to article 8(2), the Court said:

The retention by the police of photographs of a person must be justified and the justification must be the more compelling where the interference with a person’s right is, as in the present case, in pursuit of the protection of the community from the risk of public disorder or low level crime, as opposed, for example, to protection against the danger of terrorism or really serious criminal activity.

121 Christopher Slobogin, ‘Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity’ (2002) 72 *Mississippi Law Journal* 213.

122 Nancy Danforth Zeronda, ‘Street Shootings: Covert Photography and Public Privacy’ (2010) 63 *Vanderbilt Law Review* 1131.

123 *Volkszählungsurteil* [Population Census Case], Bundesverfassungsgericht [German Constitutional Court], 15 December 1983 reported in (1983) 65 *BVerfGE* 1, 43.

124 *Information Privacy Act 2000* (Vic) s 3 (Definition of ‘personal information’).

125 *Smith v Victoria Police (General)* [2005] VCAT 654.

126 This was clear from the Letter from Helen Versey, above n 2, which intimated at ‘modern technological advances’ like facial recognition and biometrics being used to identify subjects of images: at 2. A good discussion of facial recognition technology can be found in Max Guirguis ‘Electronic Visual Surveillance and the Reasonable Expectation of Privacy’ (2004) 9 *Journal of Technology Law & Policy* 143, 149. The technical process of matching numerical measurements relating to individual facial features with existing police images (mugshots), previous experiments (such as the test project at Super Bowl XXXV), and results are all discussed.

127 Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 31.

128 Kateb, above n 7, 274.

suggests being exposed to government surveillance cameras means being ‘treated as interesting and even as presumptively or potentially guilty, no matter how law-abiding one is’.<sup>129</sup> Those consequences are especially pertinent for activities like protests where it has been argued video surveillance is not only an aid to the deployment of police forces and securing evidence, but also an instrument to selectively identify and deter individual ‘troublemakers’.<sup>130</sup> For example, Kammerer in his study of German video surveillance recalls comments by a police officer that visible cameras exert a ‘dampening influence’ and a psychological-preventative effect on the ‘especially active demonstrators’.<sup>131</sup> In this sense, the protection sought by Caripis and others may be more accurately described as a right not to be observed by law enforcement without reasonable cause, no matter what the type of surveillance or its location. Alternatively, if we are to take as given the increasing ubiquity and scope of surveillance cameras, the subjects in the images captured may be seeking that their images not be badly ‘read’ by virtue of their occupying a police archive.

#### IV CONCLUSION

A near perfect ability to create photographs and broadcast them instantaneously means the image retains a chief position amongst the categories of personal information and data. The aggregation of images into databases, where they may eventually be processed through facial recognition technologies, remains a chief concern of law enforcement agencies as well as private companies, but its legality (in Australia at least) has never been challenged in a systematic sense.<sup>132</sup> Privacy is the concept generally called on to protect us from the persistent production and reproduction of image, but despite a number of recommendations being made, there is still no Australian statutory privacy action.<sup>133</sup> Common law breach of confidence, being an action to prevent the disclosure of ‘confidential’ or ‘private’ information,<sup>134</sup> has a history of dealing with photographs going back to the 1888 case of *Pollard v Photographic*

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129 Ibid.

130 Dietmar Kammerer, ‘Police Use of Public Video Surveillance in Germany from 1956: Management of Traffic, Repression of Flows, Persuasion of Offenders’ (2009) 6(1) *Surveillance & Society* 43.

131 Ibid 44.

132 Nino Bucci, ‘Smile, You May Be on a Federal Police Camera’, *The Age* (online), 11 February 2013 <<http://www.theage.com.au/technology/technology-news/smile-you-may-be-on-a-federal-police-camera-20130210-2e6kz.html>>. Private companies, rather than states, have had to alter their facial recognition practices however. For example, Facebook had to delete all their facial recognition data on European users: see Privacy and Data Protection, *Compliance News Updates* (12 February 2013) <<http://www.pdp-email.com/compliance12022013/>>.

133 See, eg, Victorian Law Reform Commission, *Surveillance in Public Places: Final Report*, Report No 18 (2010); see especially ch 3.

134 See, eg, *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473; *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

*Company*,<sup>135</sup> but has rarely been deployed in the context of governmental collection or retention, or with respect to activities taking place in public settings.<sup>136</sup> Recent Canadian and New Zealand High Court cases have established torts of intrusion on seclusion (without requiring publicity),<sup>137</sup> but there is no indication whether that approach will be followed in Australia, nor did those cases apply to public authorities monitoring activities in non-secluded places. The relatively new human right to privacy in the *Victorian Charter* unfortunately also fails to provide a direct action, and there appears to be limited enthusiasm for utilising the *Victorian Charter* generally. With looming security reforms likely to mandate data retention by communications providers,<sup>138</sup> and therefore easier access to an incredible quantity of personal information for law enforcement, one might wonder whether privacy law offers an appropriate solution at all.

To that end, since the September 11 terrorist attacks, it is argued data protection has evolved from its original design of preventing rights abuses by market actors to include preserving privacy in criminal justice systems.<sup>139</sup> Data protection and privacy are therefore overlapping in scope,<sup>140</sup> with the European Data Protection Supervisor noting, '[u]nder the case law of the European Court of Human Rights and the European Court of Justice, the storing and processing of personal data for the purposes of fighting crime constitutes an interference with the right to private life under article 8.'<sup>141</sup> But as the line between public and private increasingly blurs, the question arises as to whether privacy can adequately deal with the staggering amount of 'public' data produced about individuals everyday, and its increasing availability to law enforcement.

The first part of this article intended to demonstrate why police surveillance images should not be regulated in the same way as images subjected to unauthorised circulation. That historical exposition suggested images collected by the state in public are more connected to the critical and historical questions of 'The Archive' than the traditional privacy ideas of 'misuse of private information', 'intrusion on seclusion', or encroachment upon the natural

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135 (1888) 40 Ch D 345.

136 *Campbell* [2004] 2 AC 457 of course being a notable exception.

137 *C v Holland* [2012] 3 NZLR 672; *Jones v Tsige* [2012] ONCA 32.

138 *Equipping Australia Against Emerging and Evolving Threats* (Discussion Paper, Attorney General's Department, July 2012).

139 Francesca Bignami, 'Privacy and Law Enforcement in the European Union' (2007) 8(1) *Chicago Journal of International Law* 233.

140 For similar arguments about the (incomplete) overlap between privacy and data protection, see, eg, Megan Richardson 'Is Data Protection the New Privacy?' in *Amicus Curiae* (forthcoming, copy on file with author); Paul de Hert and Serge Gutwirth, 'European Data Protection's Constitutional Project: Its Problematic Recognition in Strasbourg and Luxembourg' in Serge Gutwirth et al (eds), *Reinventing Data Protection* (Springer, 2009); Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development' in Serge Gutwirth et al (eds), *Reinventing Data Protection* (Springer, 2009).

141 *Opinion of the European Data Protection Supervisor on the Proposal for Directive of the European Parliament and of the Council on the Retention of Data Processed in Connection with the Provision of Public Electronic Communication Services and Amending Directive 2002/58/EC* [2005] OJ C 298 2–3.

boundaries of ‘self’. Indeed the old ‘arts’ of physiognomy and phrenology appear transfigured as contemporary techniques of algorithmic data processing that place individuals in a distribution curve between the benign and the criminal. The second part suggested that data protection, with its origins in levelling the power discrepancies caused by institutional databases, is more appropriately geared to regulating archival practices, including police photography. And while Caripis unsuccessfully invoked data protection to avoid retention of her images, that regime seems likely to play a role in the future regulation of criminal intelligence gathering, especially in Australia.

This article therefore offers an interposition into the contemporary debate over whether privacy law should be reinterpreted to more effectively protect those spaces where the government cannot legitimately operate – what Lisa Austin has called privacy’s ‘rule of law’ function,<sup>142</sup> or whether privacy should be abandoned as the mechanism for moderating state surveillance. Among other reasons, scholars (primarily in surveillance studies and other sociological disciplines) contend that privacy is too individualistic a mechanism for dealing with the grand-scale social transformation of contemporary surveillance society.<sup>143</sup> If that is the case, it may be time to acknowledge that privacy’s division between ‘public’ and ‘private’ has been distended too far to effectively regulate surveillance by governments in public.

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142 Lisa M Austin, ‘Getting Past Privacy? Surveillance, the Charter, and the Rule of Law’ (2013) forthcoming *Canadian Journal of Law and Society*. Available at SSRN: <<http://ssrn.com/abstract=2152449>>.

143 See, eg, David Lyon, *Surveillance Studies: An Overview* (Polity Press, 2007); Mark Poster, *The Mode of Information: Poststructuralism and Social Context* (University of Chicago Press, 1990); Mark Andrejevic, *iSpy: Surveillance and Power in the Interactive Era* (University Press of Kansas, 2007).