

Word Count:

# Offences of Dishonesty

## Criminal Law Assignment 2014

This paper will explore the offences of theft<sup>1</sup> and dishonest manipulation of machines ('*DMM*').<sup>2</sup> It will evaluate whether these offences depart from the principles of harm and last resort.

### Offences

Part 5 of the *Criminal Law Consolidation Act 1935 (SA)* ('*CLCA*') has codified the offences of dishonesty ('*offences*') following the changes to, and enlargement of, larceny. Theft is the central charge and carries with it a substantial 10 year prison sentence.<sup>3</sup> Theft centres around the dishonest acquisition, or use of property. Property is defined broadly in order to cover a field wider than that of the prior larceny provisions.<sup>4</sup> The offender must intend to keep the property for themselves or use it in such a way contrary to the true owners consent.<sup>5</sup> *DMM*, as a minor satellite offence, is not proprietary in nature, and the offender need only gain a benefit or cause a detriment to another.<sup>6</sup> Benefit and detriment are

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<sup>1</sup> *Criminal Law Consolidation Act 1935 (SA)* s134.

<sup>2</sup> *Ibid* s141.

<sup>3</sup> *Ibid* s134(1)(a).

<sup>4</sup> *Ibid* s130 (definition of 'property').

<sup>5</sup> *Ibid* s134.

<sup>6</sup> *Ibid* s141.

complimentary within the legislation and include outcomes in regard to property and financial advantage.<sup>7</sup> A central principle to both these offences is the concept of dishonesty. Whether it is dealing with property, or the gaining of a benefit from a manipulation of a machine, illegal conduct must be dishonest. Importantly, there are defences, built into the dishonesty provisions to provide for those who find property, or who honestly believe property is theirs with which to deal.<sup>8</sup>

### **Principles**

There are many reasons as to why society must sometimes depart from the central model of criminal responsibility: The actor may not be rational, the wrong may not be clear, or offenders may have a compromised state of mind. However certain principles such as the principle of harm, and last resort are useful in guiding legislators and commentators to a justification of the criminalisation of certain conduct. So do the offences discussed depart from these principles and the central criminal model?

### **Application**

As discussed by Feinberg, the harm principle is a liberty limiting principle, first developed by Mill, used to determine if it is justifiable for the state to limit people's liberties in response to conduct that: directly harms individuals, or indirectly harms society.<sup>9</sup> 'Conduct should not be criminal unless it is harmful to others.'<sup>10</sup> However such arguments are

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<sup>7</sup> Ibid s130 (definition of 'benefit' and 'detriment').

<sup>8</sup> Ibid s131(4)-(6).

<sup>9</sup> Feinberg 11

<sup>10</sup> Introductory reading page 2

problematic if harm is not easily identifiable, is remote, or indirect which can lead to an increasing over-criminalisation. Moral arguments, such as those posited by Lord Devlin, often confuse the matter by involving judgments based on values when often no morally heterogenous society exists. I posit that if there is no identifiable harm, which includes indirect harm, from an action, such action must not be criminal. It must be appreciated that harm to the public interest, particularly in regard to dishonest behaviours, must be criminal. Even if there is no single individual that can be identified as having being harmed, the social fabric can be harmed by the actions of individuals. Therefore there are two forms of harm: private and public.<sup>11</sup>

Theft and DMM target behaviours that are harmful, and can be justified according to the understanding of the harm principle I have outlined. The dealing with property, that is owned by another to deprive them of that property is often an interaction between individuals within a society. The use of the terms *deprivation*, *substantial risk* and *serious encroachment* clearly describe the harm that is caused; an inability to enjoy property.<sup>12</sup> Therefore there is a direct harm, in that if I own something that is stolen, I am no longer able to enjoy my legal rights to that property. Similarly, there is an indirect harm to our societal framework that if people are allowed to deprive others of property our concept of ownership is severely diminished. Therefore, if the state does not limit our liberty to deal with others property, there will be no limit on others dealing with our property: ‘Protecting him in the exercise of his liberty is the point of limiting everyone else’s in this respect.’<sup>13</sup> Similarly, actions such as

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<sup>11</sup> Feinberg

<sup>12</sup> *Criminal Law Consolidation Act 1935* (SA) s134(1)-(2).

<sup>13</sup> Feinberg 8

*manipulation* and *taking advantage* of machines in both commercial and non commercial transactions create clearly harmful outcomes. In a private transaction, harm takes the form of a financial loss, or potentially the loss of property caused through the manipulation of a machine. Similarly, in the broader context our society operates under the guiding principles of capitalism whereby gains made dishonestly detract from a society which values hard work and competitive markets.

I posit that the harm principle is fulfilled by both offences. The harm principle is not incredibly restrictive as many forms of behaviour are arguably harmful.<sup>14</sup> Therefore it is important to look at other principles of criminal responsibility. The process of criminalising behaviour must be a last resort; ‘liberty should be the norm.’<sup>15</sup> Even if there are clear harms caused by behaviour, the harm principle ‘authorises criminal punishment, but does not require it.’<sup>16</sup> This is because imposing criminal sanctions has many ‘inherent costs,’<sup>17</sup> and in some cases may constitute a wrong in itself. Most notably, criminal sanctions attach stigma to the accused, and if crimes are unfairly labelled can misrepresent an offenders wrongdoing.<sup>18</sup> So are the offences punished as a last resort option, or are these crimes merely an expression of power of the legislature?

Alternatives to criminal sanctions rely upon the ability of the legislature and judiciary to ‘withhold legal powers’<sup>19</sup> rather than invade liberty with penal sanctions. Most of these

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<sup>14</sup> Introductory readings page 8

<sup>15</sup> Feinberg 9

<sup>16</sup> Introductory readings page 3

<sup>17</sup> Feinberg 4

<sup>18</sup> Fair labelling, 223

<sup>19</sup> Feinberg 22

measures involve civil remedies and sanctions rather than criminal penalties. As stated by Feinberg 'the typical criminal sanction is imprisonment, which is not only a severe deprivation of liberty...but also a brand of censure and condemnation.'<sup>20</sup> However in regard to the offences there appears to be no conflict with the idea of fair labelling or alternative penalties. The offences target specific behaviours, they describe and narrate clearly the offending that has taken place. In relaying this information to the public, and also communicating what exactly the offender has done wrong to the offender themselves, issues raised by Chalmers and Leverick, both crimes are clear and use defined language. In regard to criminal punishment for such behaviours, in each case it is easy to see that a suppression of legal powers would only affect the offender after the crime is committed and do no work towards deterrence. There seems to be no utility in employing alternatives to criminal sanctions.

Therefore I posit that the offences are principled in regards to promoting a healthy society, protecting others from harm and are indeed a last resort for specific behaviours.

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<sup>20</sup> Feinberg 24