

## THE HARMS AND WRONGS OF STEALING: THE HARM PRINCIPLE AND DISHONESTY IN THEFT

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Despite reform or expansion of property related offences being a regular feature of political debate, it is rare to hear of any acknowledgement of principled limits to the use of criminal sanctions to protect property interests. Often, the level of debate is no more sophisticated than a feeling that there ‘ought to be a law against it’. Searching for a unifying set of principles for the criminal law as a whole is arguably an exercise bound to result in failure.<sup>1</sup> However it remains important to articulate general principles that apply to subsets of the criminal law; and to provide explanations as to why certain activities are not regulated by law generally, or criminal law in particular. These principles can serve as a means of identifying whether proposed offences fall within previously accepted boundaries or involve new uses of the criminal law, and thus demand special justification.

Theft (or larceny at common law) traces its provenance back to the earliest of criminal codes and is a crime that in the conventional account of law has never appeared to require any justification for its existence.<sup>2</sup> While the core of the offence is generally accepted to amount to criminal activity, use of the offence in particular ways and extensions of the scope of the offence have often been controversial. A wave of expansion in the potential scope of the criminal law relating to theft has occurred in recent decades with the development of new forms of property, and the increasing reliance on criminal sanctions to enforce them, underlining the desirability of a shared set of principles that can delineate boundaries for the scope of the criminal law in this area.

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1 See, eg. David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4<sup>th</sup> ed, 2006) ch 1.

2 This article only attempts a critique of the justification of theft and its proper scope on its own terms – that is within the terms of the conventional understanding of law and its enforcement of property rights. It is acknowledged that alternative and critical perspectives on property ownership and theft exist, such as in Marxist and feminist accounts, and that a full account of criminal law requires their consideration.

An important essay by Andrew Simester and Gordon Sullivan,<sup>3</sup> constitutes an attempt to provide a principled basis specifically for property offences. In their short paper, the authors raise significant questions about the underlying harm that property offences seek to prevent, whether the same harm underlies all property offences, whether dishonesty can be a basis for criminalisation and, finally, whether there are distinct moral wrongs in each property offence. In so doing, Simester and Sullivan argue that property offences can be justified by an expansive concept of the well-known Harm Principle, but that dishonesty represents a ‘morally driven incursion into property rights’ that cannot be accepted.<sup>4</sup>

This article evaluates the approach taken by the authors in light of criticisms of the Harm Principle. It suggests that in order for the Harm Principle to be a strong justification of property offences, a narrower focus and definition of the principle is needed than in relation to other areas of law. The article suggests that despite modern compendious forms of the theft offence, it is possible to see the offence as a collection of separately identified and specific harms. This article also suggests that by seeing theft as aimed at preventing these more specific harms, there is greater justification for the inclusion of dishonesty as an element of the offence. Indeed, contrary to the approach of Simester and Sullivan, harm and moral wrongness are interlinked concepts, and dishonesty is thus an essential aspect of the justification of theft offences.

## I THE HARM PRINCIPLE

The Harm Principle means different things to different people. Even John Stuart Mill, who is credited with having developed the principle, never consistently articulated a clear idea of what he meant by ‘harm’, and the meaning of the principle seems to have distinctly different nuances in various parts of his work. At its core, however, Mill’s idea was a negative one. The Harm Principle was intended to prevent governments in any way legislating to control morals or harm to oneself. It was famously revived by H L A Hart in his debate with Lord Devlin over the legal enforcement of morality. Devlin had argued that the primary role of the criminal law was to protect the moral fabric of society (a position that came to be known as legal moralism).<sup>5</sup> Hart argued that this view was mistaken and that use of the criminal law to control moral issues such as sexual behaviour could only be justified on the basis that the offence prevented

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3 A P Simester and G R Sullivan, ‘On the Nature and Rationale of Property Offences’ in R A Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (2005) 168. The essay builds on earlier consideration of the issues in A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (2<sup>nd</sup> revised ed, 2003) and A P Simester and Andrew Von Hirsch, ‘Rethinking the Offence Principle’ (2002) 8 *Legal Theory* 269.

4 Simester and Sullivan, above n 3, 177.

5 Sir Patrick Devlin, *The Enforcement of Morals* (1959).

the causing of harm.<sup>6</sup> For both Mill and Hart, the Harm Principle operates to prevent legislation that aimed to protect individuals from themselves.

One of the key difficulties with the Harm Principle is the definition of what amounts to a harm. Mill begins his essay, 'On Liberty', with the strong statement that:

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right ... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>7</sup>

However, in the course of his argument, Mill's principle morphs into a significantly more complex idea. Bernard Harcourt notes that Mill used the Harm Principle to justify the regulation of the consumption of alcohol, procreation, education, intoxication and indecency.<sup>8</sup> In his debate with Devlin, Hart returned to the simple concept set out in the beginning of 'On Liberty'. The difficulty is that this concept, though rhetorically powerful, fails to properly deal with the many forms of harm that may exist. Recognising that the Harm Principle has been loosely used to justify many apparently morals-based offences,<sup>9</sup> Joel Feinberg undertook a massive analysis of the concept and competing ideas in an attempt to make the principle more robust in his four volume work, *The Moral Limits of the Criminal Law*.<sup>10</sup>

Feinberg sees the principle as an enabling basis on which criminal laws *can* be based,<sup>11</sup> and his analysis is therefore much broader than Hart's, who was merely using it to rebut Devlin's analysis. In *The Moral Limits of the Criminal Law*, Feinberg engages in a complex and sophisticated defence of the principle as a basis for a liberal world view, but in so doing both broadens the concept and admits that other competing principles may also provide a basis for legislation. Feinberg concedes that the Harm Principle is neither a necessary nor sufficient basis for criminalisation. He begins the first volume, *Harm to Others*, by retreating from Mill's argument that the Harm Principle is the only basis for criminalisation by accepting that the principle of 'offence' could also form a

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6 H L A Hart, *Law, Liberty and Morality* (1963). He admitted that in other areas 'there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others': at 5.

7 John Stuart Mill, 'On Liberty' (1859) 22.

8 Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109, 121–2.

9 Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (1987) 13.

10 Ibid; Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (1988); Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (1989); Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (1990).

11 Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, above n 9, 4. See also Joel Feinberg, "'Harm to Others' – A Rejoinder" (1986) 5 *Criminal Justice Ethics* 16.

sound basis for criminalisation.<sup>12</sup> By the end of the fourth volume, *Harmless Wrongdoing*, he further concedes that while the Harm and Offence Principles (as defined by him) ‘state reasons that are always good and frequently decisive for criminalization ... legal moralism states reasons that are sometimes (but rarely) good’.<sup>13</sup>

The result is that although Feinberg develops a highly technical and attenuated version of the Harm Principle, he is unable to exclude other principled bases for criminalisation, and the Harm Principle is consequently diminished as the key touchstone for limiting criminalisation within the liberal world view.<sup>14</sup>

In defining harm as a setback to one’s interests, Feinberg draws a distinction between a broad notion of harm and a narrower one of what he calls ‘injury’. For Feinberg, injury is specific damage done to a person’s body, whereas harm is a much broader concept. Harm need not involve any physical component, as it is merely a setback to one’s legal interests.<sup>15</sup> Such harms can be caused by either natural causes or by human acts; however, only human-caused harmed conditions can be a basis of legal strictures. Further, within the subset of human-caused harmed conditions, many setbacks to a person’s interests can be legitimately caused, and may even be an overall moral good. In addition, complications are caused in situations of competing harms. Thus, Feinberg relies on a technical definition of harm for the purposes of the Harm Principle: that a harm within the principle is restricted to one that not only constitutes a set-back to one’s interests, but also constitutes a wrong to the person.<sup>16</sup>

There is a strong link between wrongs and moral issues. For Feinberg, a wrongful act is one that is morally indefensible.<sup>17</sup> Although he acknowledges that this commits his theory to reliance on a set of pre-legal moral rights,<sup>18</sup> in relation to core criminal offences he does not see this as contentious. Feinberg argues that each person has a set of basic welfare interests – the right to life, to

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12 Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, above n 9, 11–12. Feinberg describes offence as including: ‘unpleasant sensations, disgust, shocked sensibilities, irritation, frustration, anxiety, embarrassment, shame, guilt, boredom, and certain kinds of responsive anger and fear’: at 46. Whether such states can justify criminal law is the subject of exhaustive discussion in Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others*, above n 10. For a critical analysis of whether Feinberg’s notion of offence is overly broad, see Simester and Von Hirsch, above n 3.

13 Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing*, above n 10, 324. Conversely, the fact that a wrong alone has been suffered by a person is considered by Feinberg as generally insufficient to be a basis of criminalisation.

14 See Harcourt, above n 8, for examples of how the Harm Principle has been used in anti-liberal ways.

15 Feinberg, above n 9, 105–6.

16 *Ibid* 33–4.

17 *Ibid* 107–8.

18 *Ibid* 111. Feinberg states:

[The maintenance of] welfare interests ... at a minimal level is a necessary condition for the advancement of any other interests at all. Welfare interests most certainly are grounds for moral claims against others if any interests are. If we can speak of moral rights at all, then, each of us has a moral right to life, minimal health, economic sufficiency, political liberty, and so on. ... The welfare interests then are the grounds for valid claims against others (moral rights) *par excellence*. They are reasonable interests reasonably ascribed, if not to every person in the world without exception, at least to the standard person that must always be before the legislator’s eye: at 112.

minimal standards of health, economic sufficiency and political liberty, etc.<sup>19</sup> Any breach of legal protections of these interests is to Feinberg morally indefensible, without the need for further argument.<sup>20</sup> He goes on to state that many other interests of persons ('ulterior interests') contain within them aspects of the welfare interests and can thus be situated within the Harm Principle. Feinberg's explanation of this idea in relation to theft is discussed below.

While Feinberg has sought to define the Harm Principle within the context of the criminal law, others have seen it as having a far broader application, as it has been applied to justifications of the law of torts<sup>21</sup> and the law of contract.<sup>22</sup> An example of the broad application of the principle is the use it is put to by Joseph Raz.<sup>23</sup> In Raz's view, the Harm Principle is another expression of the principles of autonomy and toleration. Raz defines harm as any action that results in a person being less well-off than they would otherwise have been, and he extends this to include situations of omission where a person under an obligation to increase another's future opportunities fails to do so.<sup>24</sup> Consequently, Raz sees the Harm Principle as justifying actions 'to redistribute resources [through taxation], to provide public goods and to engage in the provision of other services on a compulsory basis'.<sup>25</sup> While such a broad conception of the Harm Principle is useful as a philosophical principle in defining the appropriate boundaries of law and government, it is not useful in the political sense in which it was employed by Mill and Hart. In other words, such a broad conception fails to provide any real limits to the scope of the criminal law.

## II CRITICISMS OF THE HARM PRINCIPLE

While the Harm Principle is widely seen as the basis of the liberal concept of appropriate use of the criminal law, it has been subject to significant criticism. Although it is beyond the scope of this article to consider the voluminous literature that debate regarding the Harm Principle has spawned in recent years, two lines of critique may be representative of the types of criticisms levelled at its use in relation to the criminal law.

The first critique is that the Harm Principle is so flexible as to be largely meaningless. Harcourt has argued that the expansion of the concept has come at

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19 Ibid 36.

20 Ibid 111.

21 See, eg, Richard A Epstein, 'The Harm Principle – and How it Grew' (1995) 45 *University of Toronto Law Journal* 369.

22 See, eg, Stephen A Smith, 'Towards a Theory of Contract' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, 4<sup>th</sup> Series* (2000) 107.

23 Joseph Raz, 'Autonomy, Toleration, and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (1987) 313.

24 Ibid 329.

25 Ibid 330.

the cost of reducing the ability of the principle to exclude areas from the scope of the criminal law to near vanishing point.<sup>26</sup> He states:

The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless ...

The harm principle was used to *exclude* certain categories of activities from legal enforcement (*necessary condition*), but it did not determine what to *include* (*but not sufficient condition*), insofar as practical, constitutional or other factors weighed into the ultimate decision whether to regulate a moral offense. Today, although the harm principle formally remains a *necessary but not sufficient* condition, harm is no longer in fact a *necessary* condition because non-trivial harm arguments are being made about practically every moral offense. As a result, today, we no longer focus on the existence or non-existence of harm. Instead, we focus on the types of harm, the amounts of harms, and the balance of harms. As to these questions, the harm principle offers no guidance. It does not tell us how to compare harms. It served only as a threshold determination, and that threshold is being satisfied in most categories of moral offense. As a result, the harm principle no longer acts as a *limiting principle* with regard to the legal enforcement of morality.<sup>27</sup>

Harcourt points out that almost anything can be defined as a harm if one is inventive enough, and that the key limiting factors in the Harm Principle are in fact other supplemental normative factors.<sup>28</sup> Harcourt suggests that, for Mill, this was a principle of the ‘utility in the interest of “man as a progressive being”’,<sup>29</sup> for Hart ‘an abhorrence for human suffering’,<sup>30</sup> and for Feinberg, the normative element is ‘a type of legal reasoning based on consistency, equal treatment of similarly situated persons, analogy, and harmony’.<sup>31</sup>

It is the very elasticity of the concept of harm that is argued by Harcourt as proving that the Harm Principle is in fact an illiberal concept, and that its use by liberals has only been on the basis of sleight of hand. A similar point is made by Stephen Smith, who contends that the Harm Principle is a hollow concept:

It is an empty vessel, alluring and even irresistible but without any inherent legal or political content, into which advocates can pour whatever substantive views and values they happen to favor. Vessel and contents can then easily become confounded – with pernicious effects.

Perhaps the major problem that results is that advocates are tempted to advance their values and views not on their substantive merits, but rather by promoting the vessel, or the packaging.<sup>32</sup>

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26 The exception would seem to be those offences that merely offend the principle of offence. See, eg, Simester and Von Hirsch, above n 3.

27 Harcourt, above n 8, 113–14.

28 Ibid 185ff.

29 Ibid 188.

30 Ibid 189.

31 Ibid 191.

32 Steven D Smith, ‘The Hollowness of the Harm Principle’ (Working Paper No 17, University of San Diego Public Law and Legal Theory Research Paper Series, 2004) 8. In a later published version of the paper, Smith argues that the Harm Principle is irredeemably illiberal: Steven D Smith, ‘Is the Harm Principle Illiberal?’ (2006) 51 *American Journal of Jurisprudence* 1.

A second critique is one made by Anthony Duff. He suggests that on Feinberg's concept of harm, the true nature of what it is that amounts to real harm is missing.<sup>33</sup> Duff has argued that in viewing sanctionable harms as a combination of a harmed condition and a wrong, Feinberg fails to appreciate that there are important differences in the way we see various forms of harmed conditions. Duff argues that there is a quantifiable difference between those forms of harm caused by natural events and negligence and those intentional harms which can be characterised as attacks on the victim or the victim's interests. From the victim's perspective, it is not a combination of a harm and a wrong that is suffered; rather, what is suffered is a specific type of harm.<sup>34</sup> Thus, Duff suggests that a victim of a burglary suffers a real sense of violation, based on an appreciation of the intention of the burglar to invade the home, and this sense of violation is conceptually separate to the harm caused by the loss of the property stolen and the wrong of invading someone's private dwelling and stealing property.<sup>35</sup>

These criticisms suggest that if the Harm Principle is to be a firm basis for justification of criminal offences, the harm that those offences seek to prevent should be clearly understood and should resonate with lived experience, as suggested by Duff. To the extent that the harm the offence seeks to protect against is conceived of as an abstracted or attenuated harm, it is open to the criticisms of Harcourt and Smith. Harcourt's analysis also suggests that in analysing any particular deployment of the Harm Principle, it is important to expose the supplemental normative factors that underlie the use of the principle, and in terms of Feinberg's conception of harm, these normative factors are likely to influence what is determined to amount to the moral wrongness of the act.

### III APPLYING THE HARM PRINCIPLE TO PROPERTY INTERESTS

There appears to be general agreement that offences such as theft are core criminal offences, and ones justified by the Harm Principle. However, the basis for this justification – that is, the nature of the wrongful harm involved in theft – has not been discussed in great detail. Simester and Sullivan have contributed to this area by pointing out the necessity of some elaboration of the nature of the harm.

Simester and Sullivan argue that it is not permissible to justify state interference to protect property interests per se. While not denying that property rights have historical and analytical roots that are pre-legal, they argue that the present recognition of property interests is based entirely on legal rules. Thus, without further justification, any reliance on the breach of property rights as a

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33 Similar arguments are made by Arthur Ripstein: 'Beyond the Harm Principle' (2006) 34 *Philosophy & Public Affairs* 215.

34 R A Duff, 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13, 22–3.

35 *Ibid* 24.

harm would be circular. They seek to avoid this circularity by arguing that there is good reason for protection of property rights as a *regime*.<sup>36</sup>

If the regime can be justified in terms of the Harm Principle, then, logically, any breach of the rules of the property regime can likewise be justified by the Harm Principle.<sup>37</sup> For them, the property rights regime can be justified because:

property facilitates the creation of forms of welfare and human flourishing that would be unattainable should that institution be lost. ... The regime itself serves our well-being: it provides a reliable means by which we can pursue a good life, through the voluntary acquisition, use, and exchange of resources. Having such a system may promote our well-being even if the particular form of the regime is imperfect, provided the community as a whole benefits by having a predictable, reliable, set of rules with which to organise their lives. Assuming minimum standards of just distribution of property, the proprietary regime is a public good.<sup>38</sup>

This regime would, however, be ineffective if it was not supported by the state, and the failure of the regime would be a harm that would be indirectly suffered by individuals. In this way, Simester and Sullivan construct a broad understanding of the nature of harm and argue that the Harm Principle justifies state intervention when the regime is not adhered to. As a result of establishing a basis for protecting property rights as a regime, they go on to argue that there also need be no particular setback to any individual's interest, so long as the act is in some way wrongful. This is because although the individual may not suffer any practical harm with the wrongful taking of property that to them is worthless, such actions nonetheless set back the interests of the community as a whole by amounting to a harmful interference with the *regime* of property interests.<sup>39</sup> Simester and Sullivan claim that misappropriation of property rights:

attack[s] the practices of creating and exchanging property rights. In doing so, they set back the dependability of proprietary entitlements; which, in turn, restricts the ability of property owners to plan their own lives, relying on both the property rights they have already and on the expectation of being able to improve their lives by formulating proprietary transactions in the future.<sup>40</sup>

Because this general harm is suffered by all when a wrongful misappropriation occurs, they argue that the Harm Principle justifies state intervention even if the loss to the individual concerned is merely nominal, and absent the general harm, would fall outside the Harm Principle. Thus, while in many cases individuals will have suffered a setback to their economic interests, this need not be substantiated. In this sense, they argue that any harm to the individual is 'parasitic' on the harm to the regime of property rights.

The danger in this approach is that in order to avoid the circularity of seeing infringements of property rights per se as harms, the justifying focus moves from

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36 They point out that property rights are legal constructs and it is consequently circular to argue that any interference with such rights amounts to a harm – unless the assertion of such rights can be justified from a point external to the law: Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 170 ff.

37 This logic is questioned below.

38 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 171.

39 Ibid 172. See also Simester and Von Hirsch, above n 3, 286.

40 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 172.



the specific to the general. While it is clearly the case that a complete failure of a private property regime would be a devastating harm to many people,<sup>41</sup> it is not clear that the property right regime is itself per se a public good. This is recognised by Simester and Sullivan when they place the caveat of ‘minimum standards of just distribution of property’ on their conclusion that the regime is a public good. The problem is how to identify what those minimum standards are;<sup>42</sup> and if breaches of those standards do occur, whether protection of parts of the regime should be removed, or the whole regime abandoned. Simester and Sullivan provide an example of a person who frees slaves and suggest that the Harm Principle cannot proscribe such actions because the regime under which slave rights exist cannot be justified.<sup>43</sup> However, the legal recognition of slavery cannot de-legitimise the entire property regime of that society – only those parts that protect slavery. Even countries with gross human rights abuses require a working private property regime in order to operate as a society. Logically then, unless one is able to pick and choose between parts of a regime that can be justified, it seems that every property regime is worthy of protection by the law, no matter how unjust its operation is to particular individuals.<sup>44</sup>

Further, an argument that the property regime is a public good, and that breaches of its rules amount to harm, has its own logical difficulties. As Arthur Ripstein has pointed out, viewing property as a social benefit that would be lost if not enforced creates both political and conceptual problems. From a political perspective, it is unclear why the argument could not be used to justify legal protection for any practice seen to be beneficial; Ripstein mentions religious conformity, the nuclear family and Devlin’s notion of moral standards as examples of such practices. Why property rights are justified in being protected by the law in ways these other ‘benefits’ are not appears to require further external justification.<sup>45</sup>

From a conceptual perspective Ripstein notes:

The conceptual difficulty is that the appeal to vulnerable practices trades on an ambiguity between harming a practice and violating its rules. ... In the case of property, even if [Hume’s notion of] ‘abstinence [from the possession of others]’ is the rule that makes up the practice, the harm principle demands a positive case be made to show that enforcing it is the only way to protect the practice. Rules always prohibit their own violation – that is what makes them rules – and rules that make

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41 In many instances, this harm will be of a nature additional to mere violations of property rights.

42 This is a contestable issue, and quite different answers might be posited by, for example, feminists in relation to the need to redress the gender imbalance in property ownership; Marxists in relation to the imbalance in favour of capitalists; advocates of digital commons in relation to the concentration of knowledge ownership in multinational conglomerates; etc.

43 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 172.

44 As Harcourt suggests, what is at play here is a supplemental moral norm about property regimes: see above n 8, 185 ff. It seems that despite the argument that the entire regime is to be protected, a liberal concept of what is an appropriate general approach to property ownership is applied and egregious breaches of that principle are seen to permit civil disobedience, whereas less egregious breaches are not. Later in the essay, Simester and Sullivan appear to reject the carving out of some areas of property rights as being unworthy of the protection of criminal law: *ibid* 179.

45 This is the argument Harcourt makes: Harcourt, above, n 8.

up a practice will ‘call for’ enforcement even in cases where the institution is not in danger. Whatever the rationale for enforcing the rules of chess or baseball, it is not that otherwise chess or baseball would be vulnerable to collapse. The most that can be said about games and other purely conventional practices is that making the rules and prohibiting their violation comes down to the same thing. We do not need to look to the effects of violations, either in particular or in general, in order to recognize that the rules create the game by prohibiting their violation.<sup>46</sup>

Consequently, a justification of property offences on the basis that there is a need to protect the general property rights regime in a society fails to clearly articulate how enforcement of *all* rules per se is necessary to avoid failure of the regime. While Simester and Sullivan accept that breaches of property rules per se cannot be said to amount to harms, they do not provide any substantive arguments to justify the claim that any such breach is per se a harm to the regime of property rights.

It is important to note that to this point the argument only amounts to an exposition of why the Harm Principle justifies the intervention of the law generally, and not why criminal law should be used to punish those interferences. From the beginning, Mill seems to have accepted that civil law could also be coercive.<sup>47</sup> Indeed, by the end of his discussion of the principle, Mill was of the view that the Harm Principle could be used to justify the civil regulation of a wide range of activities.<sup>48</sup> Simester and Sullivan are similarly aware of this, and indeed rely on the fact that the Harm Principle justifies civil law coercion to make their argument that the Harm Principle can be relied on to justify a property law regime. Thus, their argument is that the public good of a property regime should be protected by civil regulation.

If the broad notion of the Harm Principle adopted by Raz is used, it is not difficult to accept that with some further elaboration the Harm Principle could be used to justify the civil enforcement of a property regime. Under Raz’s formulation, the principle can be used to justify wealth redistribution and interventionist laws, because for Raz, the notion of harm includes a failure of government to proactively create environments for the flourishing of autonomy through opportunity.

However, if the Harm Principle is to be capable of describing appropriate boundaries for criminalisation, a narrower and more focussed sense is needed, as the broad approach provides no basis for differentiation between civil and criminal law. As Simester and Sullivan rely on a broad approach to the Harm Principle to capture a notion of harm to an overarching property regime, the Harm Principle is thus insufficient to justify criminalisation. This then requires them to provide an additional factor that provides differentiation between civil and criminal wrongs.

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46 Ripstein, above n 33, 226.

47 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 171.

48 Harcourt notes: ‘The harm principle, in Mill’s own hands, produced a blueprint for a highly regulated society: a society that regulated the sale of potential instruments of crime, that taxed the sale of alcohol and regulated the public consumption of alcohol, that regulated education and even procreation, and that prohibited public intoxication and indecency’: Harcourt, above n 8, 121–2.

#### IV THE HARM PRINCIPLE AND THEFT

Simester and Sullivan recognise the need to provide further justification for criminal laws. However, despite its importance, they only refer to the issue in passing, arguing that protection of property interests by the criminal law is justified on pragmatic and symbolic grounds. Pragmatically, individuals may not have the means to assert their rights in the courts, and the mobilisation of state agencies acts as a deterrent to further violations of the regime of property rights. Symbolically, the proprietary regime is underpinned by ‘public denunciation of proprietary usurpations’.<sup>49</sup> Both justifications, however, are somewhat weak.<sup>50</sup> In fact, both arguments would appear to be able to justify the criminalisation of breaches of any form of civil regulation.

The inability of persons to assert their rights in court speaks to a need to reconfigure the civil law processes, not a need to enact a separate set of criminal sanctions.<sup>51</sup> The ability of any victim to gain redress is very limited in a criminal setting, as prosecution is at the discretion of government authorities, and the outcome of cases does not automatically result in any form of redress to the victims. Absent a fully developed victim’s rights rationale for criminal law, the victim is merely a possible witness to the criminal law proceedings. The idea that there is pragmatic value in the state being entrusted with investigation of property rights interferences is also problematic. In practice, police resources are largely inadequate to investigate the types of theft that affect most citizens, with the pragmatic response being to instead rely on insurance. Further, a reliance on the state to investigate does not necessarily require that the outcomes of such investigations be criminal charges.

In relation to the symbolic role of the criminal law, the problem is that public denunciation can occur in a variety of forms and with many agendas. It therefore requires a more detailed elucidation of exactly what forms of denunciation are appropriate, and for what types of proprietary usurpations. Denunciation implies an underlying moral wrong, and the use of the criminal law as Hart put it, ‘to “ratify” the morality which [the offender] has violated’.<sup>52</sup> Hart comments that denunciation:

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49 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 172.

50 Feinberg has admitted: ‘I can discover no litmus test for determining which of the prohibitions legitimized by the Harm Principle should be enforced criminally as well as civilly or administratively’: Feinberg, above n 11, 22.

51 Pragmatic grounds based on deterrence or public safety may be more viable avenues to explore.

52 Hart, above n 6, 63.

represents as a value to be pursued at the cost of human suffering the bare expression of moral condemnation, and treats the infliction of suffering as a uniquely appropriate or ‘emphatic’ mode of expression. But is this really intelligible? Is the mere expression of moral condemnation a thing of value in itself to be pursued at this cost? The idea that we may punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship.<sup>53</sup>

Historically, the use of the criminal law for denunciatory purposes has been criticised, for example, in 18<sup>th</sup> century England.<sup>54</sup> Denunciation is now accepted as playing a role in punishment,<sup>55</sup> however, an evaluation of the respective strengths of the various theories of retributive and expressive roles of the criminal law is beyond the scope of this article. Nevertheless, denunciation would seem to be a role that the criminal law might play in the enforcement of crimes already accepted as within the criminal canon. An intuitive need for denunciation should not be a basis for criminalisation. Indeed, to say that breach of property rights requires criminalisation in order to allow for denunciation begs the question of why it should be criminalised in the first place.

A further difficulty with basing a rationale for the use of criminal law on general concepts of pragmatism and denunciation is that it appears to have the effect of ensuring that every breach of a property right is to be enforced criminally – in which case there is no differentiation between civil and criminal law. The proposition thus amounts to merely reversing the way of stating the issue.<sup>56</sup> Consequently, further principles are needed to establish which particular types of breach are in need of pragmatic or symbolic assistance by the criminal law. While in other writings Simester and Sullivan clearly acknowledge that justification of criminal laws requires the consideration of factors additional to the establishment of some form of harm,<sup>57</sup> these factors are not discussed in ‘On the Nature and Rationale of Property Offences’. Given the need to identify such additional factors, it seems that nothing is added to the argument by the appeal to general principles of pragmatism and symbolism, and the argument as to which breaches of the civil law of property can be enforced with criminal sanctions

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53 Ibid 65–6.

54 See, eg, Douglas Hay, ‘Property, Authority and the Criminal Law’ in Douglas Hay et al (eds), *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (1975) 17.

55 Denunciation is now enacted as a statutory aim of sentencing in NSW: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f). It was apparently only recently considered by NSW courts as a factor: Judicial Commission of NSW, Sentencing Benchbook [2–280], citing *R v MacDonald* [1995] (Unreported, NSSWCCA, Gleeson CJ, Kirby P and Hunt CJ, 12 December 1995) as the first instance <[http://sis.judcom.nsw.gov.au/benchbks/sentencing/purposes\\_of\\_sentencing.html#d4e1612](http://sis.judcom.nsw.gov.au/benchbks/sentencing/purposes_of_sentencing.html#d4e1612)>.

56 That is, rather than asking what civil breaches can be enforced criminally, it makes the question which criminal breaches should only be enforced civilly.

57 A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3<sup>rd</sup> ed, 2007), 581–604. As they note, it needs to be shown that criminal law is the ‘best method of regulation, being preferable to alternative methods of legal control that are available to the State; and the practicalities must be considered of drawing up an offence in terms that are effective, enforceable and meet rule of law and other concerns’: at 581–2.

turns on the more specific differentiators. On this basis, it seems possible to dispense with any reliance on those general principles.

For the purposes of this article, the key issue is whether it is possible to identify some additional aspect to the harm or moral wrong in the nature of a theftuous appropriation of property that justifies its criminalisation – as opposed to a civilly prohibited appropriation of property that does not have that characteristic. As discussed below, Simester and Sullivan criticise current English law for finding such a differentiator in dishonesty.<sup>58</sup> Before dealing with that criticism, it is useful to consider how they conceptualise the differentiating factors of other property offences, and whether the approach they take to these offences can also be applied to the scope of theft.

## V OTHER PROPERTY OFFENCES

Having argued that theft is justified on the basis that it protects the general property rights regime, Simester and Sullivan go on to question whether there is need for any other core property offences.<sup>59</sup> They suggest that some others are necessary, even if theft is very widely defined. What is of interest is their consideration that these other offences have distinct moral bases that constitute the wrongness of the harm caused.

Property damage generally involves forms of vandalism that ‘may well cause alarm and concern even to bystanders lacking any proprietary interest in the property being damaged’,<sup>60</sup> and vandalism often contains an expressive element of contempt for the victim and society which constitutes an additional wrong to that of the trespass on the property rights.<sup>61</sup> On this basis, Simester and Sullivan consider that property damage is best seen as forming part of the family of criminal offences relating to public order. They also point out that while theft redistributes wealth, criminal damage reduces the amount of wealth society has, and is thus distinctly different to theft.<sup>62</sup>

Burglary is seen by Simester and Sullivan as constituting the moral wrong of an invasion of privacy, often with additional elements of violence. Receiving (or handling) stolen goods they consider to constitute the moral wrong of treating stolen goods as a kind of contraband currency.<sup>63</sup> Robbery is considered to be a distinct moral wrong to theft, not only because of the element of violence, but

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58 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 176–7.

59 They accept that ancillary offences such as conspiracy, attempt, false accounting and receiving/handling of property are required: Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 183.

60 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 184.

61 They suggest that it is also possible to see criminal damage as another pure offence, arguing that in cases of damage to property, there is no requirement that the victim suffer any real harm or setback to his or her interests. However, as the other expressive elements are normally involved, they conclude it should be seen as a public order offence.

62 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 185.

63 *Ibid* 190.

more importantly because the victim is made to experience the deprivation of property, which has personal psychological implications.<sup>64</sup>

Further, the authors argue that a clear distinction between theft and fraud can be made on the basis that fraud does not undermine the property rights regime. Rather than ignoring the mechanisms by which property can be transferred as a thief does, the deceiver exploits them. This leads the authors to suggest two issues. First, fraud is not properly a property offence, the gravamen of the offence lies in the use of deceptive means to obtain the property, not the obtaining itself. Secondly, the harm caused by the offence is to break down the trust that people have in property exchanges.

Stephen Shute and Jeremy Horder see a similar distinction between theft and fraud.<sup>65</sup> They argue that fraud is morally distinct from theft in that it amounts to an abuse of the autonomy enhancing practice of *giving*. Theft, by contrast, is a *taking* that rejects the social practice of autonomous giving. The wrongdoing constituted by fraud amounts to the actions of a ‘traitor within’ the system of property ownership and transfer, not making ‘war on a social practice from the outside’ as a thief does.<sup>66</sup>

While it is beyond the scope of this article to examine the arguments for these distinct moral wrongs in detail, Shute and Horder do suggest that theft may also contain within itself a distinct moral wrong,<sup>67</sup> rather than being a ‘pure’ crime.

## VI AN ALTERNATIVE UNDERSTANDING OF THE HARM IN THEFT

Much of the difficulty that Simester and Sullivan face in their justification of theft through the Harm Principle is based on the over-inclusive scope of the English theft offence. In discussing the role deception offences could play in the criminal law, the authors argue that the English theft offence has gone too far in making virtually all cases of fraud an instance of theft. While suggesting a rolling back of theft in this instance, they fail to critique other aspects of the broad theft offence that expanded larceny to include embezzlement and fraudulent conversion.

By failing to further unpack the theft offence, Simester and Sullivan are forced to rely on the extremely vague and broad understanding of the Harm Principle as

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64 Ibid 194.

65 Stephen Shute and Jeremy Horder, ‘Thieving and Deceiving: What is the Difference?’ (1993) 56 *Modern Law Review* 548, 551.

66 Ibid 553.

67 Stuart Green has suggested that this is the case: Stuart Green, *Lying, Cheating, and Stealing* (2006) 92. However, his examination of the moral wrongness of stealing focuses on aspects of stealing that tie into elements of the crime other than dishonesty. Thus, he sees the moral wrongdoing as involving an intentionally fundamental denial of another’s rights of ownership to property where that right of ownership is morally legitimate. He adds to the end of his discussion a final caveat that this is a *prima facie* wrong, and provision needs to be made for those instances where such takings are not considered to be morally wrongful. It is the nature of this caveat, and whether it should be a part of the offence description, that this article is discussing.

establishing a harm to the property rights regime. In so doing, the version of the Harm Principle that they propose is largely a hollow one. As Stephen Smith has argued, by abstracting the Harm Principle in this way, the focus of attention becomes the justification of the packaging rather than the content.<sup>68</sup> In any individual instance of theft, there is no clear harm to the overall property rights regime – though in most cases there may be clear harm to the individuals beyond a violation of property rights. The focus instead seems to point towards establishing the fragility of the property rights regime and the dangers of allowing any morally based exceptions to the use of the criminal law to protect this regime.

The property loss itself is protected by the civil law. Consequently, it seems reasonable to seek a further form of harm, or a special wrongness in the appropriation, that justifies the imposition of criminal law beyond the arguments of pragmatism and symbolism. Duff's critique of the lack of emotional resonance in the abstracted forms of harm produced is also important. If the Harm Principle is to have strong moral force, it should resonate with emotional responses of victims to crimes. If it does not, then the Harm Principle is reduced to a form of theoretical packaging, and as such is easily reconfigured to suit the agenda of the particular theorist.

An alternative approach is to see theft not as a single offence, but instead as legislative shorthand for a number of conceptually distinct offences. If this is done, it becomes possible to identify different forms of harms and wrongs for the various offences. These include specific and distinct wrongs of appropriating property in a way that creates a possibility of violence or that amounts to a breach of trust placed in the accused by the victim.

As Simester and Sullivan note, historians of larceny have pointed out that in its original form, larceny was primarily an offence that acted to protect the King's peace, that is, a public order offence.<sup>69</sup> The violent taking of property, or the stealthful taking at night, were both seen as socially unnerving events.<sup>70</sup> What made these events unnerving seems to have been the threats of violence that such acts entailed. Larceny was only actionable if it was pleaded as a '*trespass vi et armis*', a taking by force and violence.<sup>71</sup> It was the element of violence that differentiated the taking from the later emerging tort of trespass. Either violence was a part of the taking – and such violent takings remain separately prohibited as robbery – or the taking created the possibility of violence if the victim retaliated, or if the thief was interrupted or accosted by a third party. Such

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68 See Smith, above n 32.

69 See, eg, George P Fletcher, *Rethinking Criminal Law* (1978) 31.

70 *Ibid* 233.

71 Following the Norman conquest, access to the jurisdiction of the *curia regis* required an allegation that the taking had been '*vi et armis*': James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 37–8. The civil action of trespass emerged at a later date as an alternative to an appeal of larceny: at 48–9. See also *Carrier's Case* (1473) Y B Pasch 13, Edw IV, f 9, pl 5; *R v Meeres* (1794) 1 Show KB 50.

takings were described as ‘manifest’ crimes; that is, they were identifiable as crimes by independent third parties.<sup>72</sup>

By contrast, offences of embezzlement and false pretences were statutory interventions into the criminal law which were enacted to deal with particular instances that fell outside of larceny. These activities had previously been seen as private matters that raised no public order issues with which the criminal law was concerned. It seems clear that the reason such activities were subsequently criminalised was because the growth of mercantilism resulted in a need to prevent actions that had the effect of undermining public trust in business transactions, or in the confidence with which one could deal with government officials, agents or trustees.<sup>73</sup> It is thus possible to see these statutory offences as having a separate conceptual basis for criminalisation to that of larceny. That is, they are based on issues of breach of trust rather than issues of public safety.

Despite the reconceptualisation of these offences as protecting property interests, and the rise of liability based on mens rea,<sup>74</sup> the continuing requirement in larceny that property be taken out of the possession of the victim retains the implicit condition that the taking is one that creates the possibility of violence if the thief is resisted. No such violence would occur in a fraud situation<sup>75</sup> because the nature by which consent is gained means the victim is unaware of the crime and there is nothing untoward in the transaction that would attract the interest of third parties.

When the fraudulent conversion offences – such as larceny by bailee<sup>76</sup> and fraudulent misappropriation of money<sup>77</sup> – are compared to the history of larceny and false pretences, it seems clear that the wrong that is being perpetrated in such situations is one of a breach of trust placed in the accused, and not a potentially violent taking. With the enactment of the English *Theft Act 1968* (UK), the previously separate fraudulent conversion and embezzlement offences were collapsed into a compendious theft offence.<sup>78</sup> Consequently, this resulted in the combining of offences that protected against different forms of wrongs.<sup>79</sup>

It is suggested that Simester and Sullivan, as well as Shute and Horder, are correct in seeing deception offences as a distinctly different form of wrong to that of theft. However, many versions of the theft offence contain within them forms of conduct that amount to significant breaches of trust that are thus much more aligned to deception than to theft. If the significant step is taken of accepting that theft contains within its overall scope a number of different and distinct wrongs,

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72 Fletcher, above n 69, 115–16.

73 Ibid 36–7; Jerome Hall, *Theft, Law and Society* (2<sup>nd</sup> ed, 1952) 35 ff.

74 This is the famous thesis of George Fletcher which he described as the metamorphosis of larceny: Fletcher, above n 69, 124.

75 Embezzlement is in many ways a specific form of fraud by conduct.

76 See, eg, *Crimes Act 1900* (NSW) s 125.

77 See, eg, *Crimes Act 1900* (NSW) s 178A.

78 *Theft Act 1968* (UK) s 1.

79 The argument in the preceding few paragraphs is explored in greater depth in Alex Steel, ‘Taking Possession: The Defining Element in Theft?’ (2008) forthcoming, *Melbourne University Law Review*.



then it is possible to avoid the need to rely on an amorphous notion of the Harm Principle.

Instead, any theft that falls within the traditional category of larceny – that is, a taking of tangible property from another without consent – amounts to an act that is potentially violent, and it is therefore appropriate under the Harm Principle to prohibit the act in the interests of avoiding physical harm or creating the reasonable fear of such harm. If harm is actually occasioned, the offence of robbery is appropriate, and if harm is highly likely because of the proximity of the victim to the harm, an aggravated offence of theft from the person may be available in some jurisdictions. As Simester and Sullivan point out, these instances involve not only the harm of violence but also broader psychological harms. For theft *simpliciter*, the harm that is being prevented is by contrast only the chance of harm. The existence of the aggravated offences implies that most cases of theft will only occur without the presence of the victim. However, there always remains the chance that the victim may unexpectedly arrive and wish to physically intervene, as well as the chance that a third party may also attempt to prevent the theft. Even if no attempt is made, fear may be occasioned to any witnesses to the theft. This is the harm that is implicit in all thefts of tangible property from the possession of another, irrespective of property loss – in essence a public safety issue.

Similarly, if a person engages in deceptive conduct, or if the person misuses the trust placed in them by another, it is appropriate to prohibit such behaviour on the basis that there is clear harm to that person's interests and ability to function as a member of society and the ability to make informed choices. This harm is wrongful because of the betrayal of trust placed in the accused, as discussed by Shute and Horder. Indeed as Simester and Sullivan argue, there is no need to see the offence as a property offence at all – and this is the direction in which modern fraud offences seem to be heading.<sup>80</sup> Criminal sanction of fraudulent conversions and defalcations by trustees can therefore be justified on this basis.

The appropriation of intangible forms of property potentially creates problems for a prevention of violence analysis, but the issue is less important than it seems.<sup>81</sup> Not all jurisdictions have felt the need to include intangible property in their definition of crime.<sup>82</sup> In such jurisdictions, unauthorised transfer of intangibles appears to be prosecuted as either unauthorised computer access or fraud.<sup>83</sup> In such cases, the wrong that seems to be underlying the prohibition is more akin to a breach of trust by the person who makes the transfer. This assumes that the accused was authorised to make the transfer, and the breach of

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80 See, eg, *Crimes Act 1900* (NSW) s 178BA; *Fraud Act 2006* (UK).

81 See, eg, Alex Steel, 'Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property' (2008) *Sydney Law Review*, forthcoming.

82 See, eg, *Crimes Act 1900* (NSW) s 117, where larceny remains at common law; *Criminal Code Act 1899* (Qld) ss 390, 391 etc; *Criminal Code Act 1924* (Tas) ss 226, 227 etc.

83 See, eg, *R v Todorovic* [2008] NSWCCA 49.

trust occurs in the misuse of technology that affects the wealth of others.<sup>84</sup> Further, an understanding of unauthorised use of computers and illegitimate electronic funds transfers as forms of wrongdoing separate from theft allows for a more nuanced and specific investigation into exactly what it is about such activities that might justify criminalisation, and possibly a greater degree of criminalisation than is justified in relation to theft of tangible property.

There are also practical implications that arise from seeing the theft offence as containing a number of different forms of harm. For example, understanding theft as retaining a core principle of preventing violence in the taking of tangible property provides an alternative to a scenario presented by Simester and Sullivan. Simester and Sullivan assert that the taking of an old shirt which V intended to throw out by D, a destitute person in need of clothing, is a crime; but that the retaking of the item by V falls outside the Harm Principle.<sup>85</sup> Their justification of this distinction is that the property right to the shirt is in V and the maintenance of the regime of property rights is more important than any issues about the use-value of the shirt to D or V. However, even on their analysis, they overlook the right of possession that D has in the shirt.<sup>86</sup> The right of possession is inferior to V's and a court may well award possession back to V, but this is a case of competing rights – not one of no rights in D. It is necessary to respect and protect the limited rights that D has to the shirt in order to prevent vigilantism.

On a prevention of violence basis to theft the outcome is somewhat different. It remains a crime for D to take the shirt from V, not because of a regime issue, but because of the very real possibility that if D is caught doing so, significant violence could ensue. But equally, it is *prima facie* a crime for V to retake the shirt because the potential for violence is just as great. However, at this point the 'defence' of a claim of right intervenes to absolve V of liability because of a legal recognition that self-help is a recognised aspect of property rights. The important difference between the two approaches is that under the prevention of violence theory, V's right to self-help is seen as a conscribed right, an exception to a broad prohibition on taking. This allows the law to place limits on the way in which the right is exercised. Under Simester and Sullivan's approach, on the other hand, any constraining of the right of recaption must be found by invoking another offence – probably the threat of an assault charge if the retaking is violent – and thus making court oversight of the process more uncertain.

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84 Offences involving unauthorised access to computers contain their own issues if assessed in terms of the Harm Principle, but two possible analyses are to see activities such as hacking as akin to property damage or trespass. The issue is a live one. See, eg, Model Criminal Code Officers, Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction* (2001), applying a damage analysis; Mary W S Wong, 'Cyber-trespass and "Unauthorized Access" as Legal Mechanisms of Access Control: Lessons from the US Experience' (2007) 15 *International Journal of Law and Information Technology* 90, critiquing the trespass model.

85 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 172, 174.

86 In a similar hypothetical, Simester and Von Hirsch recognise that D has no maintainable right against V, but overlook the existence of the right itself that D has: Simester and Von Hirsch, above n 3, 282.

## VII DISHONESTY IN THEFT

Simester and Sullivan point out that on the current interpretation of the scope of theft in England, the key differentiator as to whether the property interest will be protected by the criminal law or merely the civil law is found in the concept of dishonesty.<sup>87</sup> Thus, while an act might disrupt or repudiate an aspect of the regime of property rights, it is only seen as theft if the accused performs the act dishonestly. This element contains the moral wrongness of the act and hence its criminality. As defined in England and much of Australia, dishonesty is determined by considering whether the act was dishonest according to the standards of ordinary people, and whether the accused knew this.<sup>88</sup> However, Simester and Sullivan argue that exoneration on these grounds

amounts to a rejection on broad moral grounds of the incorrigibility of V's rights to his property. D's claim is subversive of the proprietary regime, the regime it is a function of the law of theft to uphold; it is, in effect, a claim to be a legitimate agent of distributive justice.<sup>89</sup>

This is a claim<sup>90</sup> which they contend the criminal law cannot accommodate, suggesting that if dishonesty is to be permitted to regulate the scope of the criminal law it would become 'exceedingly difficult to place limits on this morally driven incursion into property rights'.<sup>91</sup> They argue that it is not appropriate for the criminal law to be involved in such moral evaluations of property rights. In so doing, the authors resist the current of the understanding of the offence in most Commonwealth countries.<sup>92</sup>

Simester and Sullivan argue that rather than relying on dishonesty as a differentiating factor, theft should be seen to be committed purely on proof of an intention to appropriate and permanently deprive. In terms of the Harm Principle, they claim that the harmed condition is the unauthorised taking, and the wrong is constituted by the accused acting deliberately and with intention to deprive.<sup>93</sup> Although not clearly stated, it seems that Simester and Sullivan would also see

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87 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 176.

88 For England, see *R v Ghosh* [1982] QB 1053; for Australia, see, eg, *Criminal Code Act 1995* (Cth) s 130.3; cf *Peters v R* (1998) 192 CLR 493.

89 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 176–7.

90 However, the argument that a morally based element of dishonesty amounts to a justification of distributive justice seems to overstate the case. The acquitted accused is not entitled to keep the taken property, nor is he or she immune from subsequent civil litigation. Instead, all that occurs is that, on Simester and Sullivan's approach, a conclusion is made that in this instance there is no need for a symbolic denunciation of the accused.

91 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 177.

92 Dishonesty is now at the core of the modern theft offence in England, Ireland and Australia. In New Zealand, the element is also a part of the offence, but is narrowly defined in largely non-moral terms. Canada's theft offence also has dishonesty as an element, but it is defined in narrow terms as 'intentionally and without mistake for an improper purpose': *R v Skalbani* [1997] 3 SCR 995. In the United States, a collection of states of mind or situations, described generally as an 'intention to steal' is used rather than a general concept of dishonesty: see, eg, Wayne LaFare, *Criminal Law* (4<sup>th</sup> ed, 2003), 939 ff.

93 Simester and Sullivan, 'On the Nature and Rationale of Property Offences', above n 3, 177.

criminality lying in the fact that the accused appropriates the property absent a *belief* in a consent by the victim.<sup>94</sup>

The effect is to make the wrongfulness of theft derivative: ‘The wrong is, thus, derived from the harm – it is because the property is V’s that D wrongs V when she interferes with it.’<sup>95</sup> In this sense, they describe theft as a pure crime.<sup>96</sup> The difficulty here is that every interference with property is therefore a wrong, and on this argument every civil breach of property rights amounts to a crime. The only possibilities for differentiation seem to be the requirements that the taking be without consent and be with an intention to permanently deprive. However, there are significant difficulties with both. It would seem that lack of consent is basic to all intentional torts, and so cannot be a clear basis for differentiation.<sup>97</sup> Moreover, the requirement that the accused intend to permanently deprive is itself not without controversy. Uncertain legislative definition of the element,<sup>98</sup> and the existence of forms of theft in some jurisdictions that do not require it at all,<sup>99</sup> suggest that the element is not, alone, a clear basis for criminalisation. Further, intention to permanently deprive is also arguably an element of the tort of conversion. Historically, it may be that intention to deprive, along with claim of right, were merely examples of the broader concept of fraudulence or dishonesty.<sup>100</sup>

In arguing that theft is a pure crime – in the sense that the wrong is derived from the interference with the property right – Simester and Sullivan make the justification of the crime more difficult. As Harcourt has pointed out, the Harm Principle on its own is incapable of deciding between particular forms of harm; to do this, normative judgments are needed. On Simester and Sullivan’s analysis, however, the wrong of the appropriation cannot justify the prohibition of the harm because it is not logically independent of the harm and hence does not provide a normative framework for it.

Stuart Green has argued that justifiable criminal laws should contain not only a harm and *mens rea* – which he describes as states of mind of intention, recklessness or knowledge – but also a form of wrongfulness that is being

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94 See the reference to the New Zealand definition of dishonesty in Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, fn 21.

95 Simester and Sullivan, ‘On the Nature and Rationale of Property Offences’, above n 3, 177.

96 For an alternative view of pure crime, see John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Horder, above n 22, 193, 216, who argue that rape is a crime which contains a wrong without any necessary harm.

97 In fact, in England, lack of consent is not required to prove theft. Simester and Sullivan consider this is wrong and argue that it should be reinstated as a prerequisite, as it is in other jurisdictions; Simester and Sullivan, *Criminal Law: Theory and Doctrine*, above n 57, 473 ff.

98 See, eg, *Theft Act 1968* (UK) s 6, and commentary in Alex Steel, ‘Permanent Borrowing and Lending: A New View of Section 6 Theft Act 1968’ (2008) 17 *Nottingham Law Journal* 3.

99 See, eg, *Criminal Justice (Theft and Fraud Offences) Act 2001* (Ireland) s 4, where in s 4(5), ‘depriving’ is defined to include temporary deprivations; *Canadian Criminal Code* RSC 1985, c C-46, s 322.

100 See, eg, the comments of Parke B in *R v Holloway* (1849) 2 Car & Kir 942; cf the reports in (1849) 3 Cox CC 241 and (1849) 1 Den 370.

prohibited.<sup>101</sup> This wrongness he sees as rooted in concepts of morality. On Simester and Sullivan's version of theft, the fact that the wrong derives by default from the harm suggests that on Green's taxonomy it is only a *mens rea*, and that a further moral wrong is needed.

Dishonesty, despite the difficulties of interpretation that it occasions, represents this wrongfulness element. It is the element of dishonesty that separates criminal from tortious interferences with property; theft from conversion. Dishonesty is also a key element in other property related offences, in particular fraud and deception offences, suggesting that the concept has an important role across a range of property offences and is in some way fundamental.<sup>102</sup> For consistency across this area of law it seems desirable to require proof of this element in theft as well.

There is also a serious problem associated with critiquing dishonesty on the basis that it is a moral incursion. This is because the Harm Principle in Feinbergian terms is explicitly based on moral issues; Feinberg begins his work by stating, '[g]iven the inherent costs of criminalization, when a particular legal prohibition oversteps the limit of moral legitimacy, it is itself a serious moral crime'.<sup>103</sup>

The aim of the Harm Principle is thus to give moral legitimacy to criminal law, and it does this by permitting the punishment of persons who cause setbacks to interests that are defined as morally justifiable legal interests. For Feinberg, protection of property is a moral welfare interest. Consequently, it seems theoretically reasonable to temper the protection of a morally based interest with a morally based excuse. Similarly, Raz explicitly acknowledges that the Harm Principle relies on supplemental moral norms. For him, these are supplied by a desire to respect individual autonomy – which he sees as ensuring adequate options to use that autonomy.<sup>104</sup>

In light of this, it may be that in large part, Simester and Sullivan's concerns with dishonesty in theft are related to the very large role it plays in the current English interpretation of theft, which appears to include all dishonest dealings with property as if it were the accused's own, even if done with the consent of the victim.<sup>105</sup> They are right to point out that dishonesty in this context is too amorphous a concept to be able to satisfactorily define the aspect of moral 'wrongness' that justifies criminalisation.

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101 Green, above n 67, 30. Green does not, however, argue that these elements are either necessary or sufficient conditions for criminalisation, though he suggests that the lack of any 'should at least put such status into question': at 30.

102 To be fair to Simester and Sullivan, they do not discuss dishonesty in relation to fraud offences. They discuss the importance of deception, but are silent as to the general requirement that the deception be dishonest.

103 Feinberg, above n 9, 4.

104 Raz, above n 23, 327. Raz makes the point that harm in this context is a normative concept that acquires its meaning from the moral theory in which it is imbedded – which for him is a 'morality which values autonomy': at 327.

105 *R v Hinks* [2004] 4 All ER 835.

Under the common law offence of larceny, the prosecution must establish that the property had been taken from the possession of another person without their consent and with an intention to permanently deprive.<sup>106</sup> Only then was fraudulence (dishonesty) brought into play, and the lack of significant case law on its meaning suggests that it played a minor role in determining convictions. In essence, under larceny, dishonesty only played an exculpatory role that excused accused in situations that otherwise appeared to be stealing. By contrast, under theft, it is possible for otherwise apparently lawful activities to amount to stealing if a jury considers the accused to have knowingly acted dishonestly.

There is a strong basis for concern with moral incursions into criminal law if the morally based element of the offence is one that can be utilised to incriminate persons. This raises issues about crimes based on morality that was at the centre of the Hart–Devlin debate. However, if the moral element is used in a negative way, to exculpate persons, there is less force in the concern. This in turn depends on a definition of theft that is more precise than the current English version. Some jurisdictions have retained a requirement that the taking be without consent,<sup>107</sup> and that the appropriation be of a more than minimal nature,<sup>108</sup> whilst others require that the property be tangible and the appropriation be a taking of possession.<sup>109</sup>

With such further definition the role of dishonesty is likely to return in practice to an exculpatory role.<sup>110</sup> That is, in most cases the circumstances in which the property was appropriated without consent will lead to a strong inference that the person is acting wrongfully, and with a strongly defined *actus reus* boundary to the offence, prosecutors are only likely to charge theft if such an inference of wrongdoing is strong. Consequently, dishonesty is only likely to come into issue if the accused wishes to argue that appearances are deceptive and the non-consensual appropriation was actually morally justifiable – at least to the extent that the act should not deserve criminal sanction.

Of course, there is a need to ensure that some form of consistency is reached over what that element of dishonesty amounts to, and this underlies a large amount of academic concern over dishonesty. At a theoretical level, however, an avenue for exculpation based on a lack of moral wrongdoing seems justifiable. Green, for example, accepts that such exculpation is in line with intuitive senses of wrongdoing in theft.<sup>111</sup>

When the more articulated, specific forms of harm suggested above are combined with an exculpatory role for dishonesty, it may also become possible to

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106 See, eg, *Croton v R* (1967) 117 CLR 326.

107 See, eg, *Criminal Code Act 1995* (Cth) 131.1 and 131.3(1).

108 Ibid. See the commentary in Model Criminal Code Officers, Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995), 37.

109 See, eg, *Criminal Code Act 1899* (Qld) ss 390, 391, etc; *Criminal Code Act 1924* (Tas) ss 226, 227, etc.

110 For discussion of this role for dishonesty see Great Britain, Law Commission, *Legislating the Criminal Code: Fraud and Deception*, Consultation Paper No 155 (2005); Alex Steel, 'An appropriate test for dishonesty?' (2000) 24 *Criminal Law Journal* 46.

111 Green, above n 67, 92.

describe a more articulated meaning of dishonesty in particular offences.<sup>112</sup> If the harm being prevented is one of the risk of violence to the victim or third parties, then an aspect of the dishonesty is in the disregard of these considerations in appropriating the property. This may, in some cases, be subject to a countervailing claim of right, but that is essentially an argument for the defence to raise. In fraud cases where the harm is one of a subversion of the liberty of the victim to make choices about their property, the dishonesty is the intention to deal with the person in a way that knowingly goes beyond the boundary of acceptable negotiation practices. Whilst this idea requires further consideration and development, it does suggest an interesting way to consider what community notions of dishonesty might contain in any individual offence.

The concern that dishonesty might undermine property offences, and thus the property regime, and thereby lead to a general harm to society, tends to see the property regime as much frailer than it probably is. Although defendants might raise a lack of dishonesty to avoid conviction, the general community interest in maintaining the property regime means it is likely that such claims are viewed sceptically by juries, and there seems to be little evidence across the jurisdictions that dishonesty has caused significant problems in gaining convictions.<sup>113</sup> The idea that the community has a role in refusing to convict those accused of crimes by the state has a long pedigree and is seen as a major justification for jury trials. If dishonesty is given a role only of exculpation, it seems to sit well within this tradition. In any event, the property rights regime is protected in the first instance by the civil law of property, and the criminal law is only necessary to back this up in a relatively small number of instances.

Simester and Sullivan appear to be arguing that the justification for criminalisation of certain activities is based on moral grounds,<sup>114</sup> but that in defining what that activity is, it is not permissible to have regard to moral concepts. While this is relatively easy to do for offences such as homicide and assault, where the nature of the act and immediate effect is itself clearly a moral wrong, it is more difficult for property offences because the wrong is structured around legal property rights, and civil law is the default protection of such interferences. This places property offences in a special position. The activity that constitutes crimes such as murder and sexual assault are not activities that are able to be primarily dealt with by civil law enforcement, as the activity is seen as a criminal in nature. By contrast, the actions involved in theft may be construed as either theft or as civil conversion. The only difference between them must be a different quality to the activity – a criminally moral wrongness. On those grounds, it is understandable that the distinguishing element of the offence is morally based.

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112 This is offered as an early idea for further consideration.

113 See, eg. comments of the United Kingdom Law Commission, *Fraud*, Law Com No 276 (2002), [5.18]; MCCOC, above n 108, 23–5.

114 It is suggested that this is inherent in reliance on the Harm Principle, and in their use of denunciation as a further justification.

Finally, it is interesting at this point to consider Feinberg's justification for the use of the criminal law in relation to theft. For Feinberg, theft is an example of a criminal law justified by the Harm Principle *par excellence*. He argues that harm can be seen to inhere in any theft because theft 'attack[s] one's entire personal well-being, by attacking the welfare interests necessary to it'.<sup>115</sup> Although there is a general reluctance by the law to protect 'ulterior interests', theft amounts to an exception:

The law of [theft] protects not only the pauper who would be ruined by the theft of his welfare check, but also the millionaire for whom a thousand-dollar bill has less utility than a penny has for a child. There would be enormous practical difficulties in attempting to apportion degrees of protection according to the actual seriousness of harm. Moreover, protection of the wealthy person from minor thefts does not interfere with the normal everyday exercise of individual liberty, as in the other examples. Furthermore, it is not only the miserly and megalomaniacal ulterior interests of millionaires that are protected, but also their interests in liberty (the interest in being the person who decides how the accumulated funds are to be spent) and security (even his welfare interests might be threatened by the act that invades his financial interest, especially if the invasive act employs force or coercion, or seems likely to be frequently repeated). Moreover, the invasion of any person's financial interests threatens the general security of property, and the orderliness and predictability of financial affairs in which everyone has an interest, however small.<sup>116</sup>

Feinberg's final justification of the protection of the general security of property interests is similar to Simester and Sullivan's idea of protection of the property regime, and is subject to the same critique that it may only justify civil regulation. Feinberg, however, appears to be using this justification as a back-up to two other justifications which appear to be the key ones. These are the welfare interests of liberty and security. These welfare interests link strongly to the historical roots of larceny as a method to enhance public safety, and fraud as a subversion of the individual's ability to make informed choices.

## VIII CONCLUSION

The Harm Principle is a malleable concept that has been used in narrow and polemic ways, as well as in a broader, more philosophical manner. Feinberg's attempt to provide a sophisticated explanation of harm has demonstrated that there is an almost irreducible complexity to the notion of harm, and critics of the principle argue that this complexity allows for attenuated descriptions of harm to justify illiberal laws. The more attenuated the concept of harm, the more contentious is the use of the Harm Principle to justify criminalisation.

This is compounded by the use of the Harm Principle to justify forms of civil coercion, and its employment by Raz is one example of a particularly broad notion of harm. It appears that the breadth of the modern English theft offence, and the fact that not all interferences with property rights cause real harm to individuals, have led Simester and Sullivan to resort to the broader notions of

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115 Feinberg, above n 9, 62.

116 Ibid 63.



harm in order to find a justification for theft and other property offences. In choosing to consider theft as a crime based on interference with property rights, and in not accepting that property rights may have pre-legal roots, Simester and Sullivan are forced to locate the underlying harm in damage to the property regime.

This leads to a need to see the property regime as fragile and as harmed by each instance of a breach of the rules – without further inquiry as to whether a breach of that nature is harmful in a way that is significant enough to justify criminalisation. Because of the general nature of the harm, Simester and Sullivan recognise that this can only provide justification for civil coercion, and that further justification is needed to create criminal sanctions. This they find in pragmatic and symbolic grounds. However, it has been argued that these grounds do not greatly advance the argument, and that the real bases for criminalisation lie within the definition of the offence itself.

Simester and Sullivan recognise that, currently, this is the element of dishonesty, but feel this element to be inappropriate as it constitutes a ‘moral incursion’ into the criminal law. It has been argued in this article that such an incursion is appropriate, because the wrongness of the harm is a moral wrongness and, as such, it is not possible to excise moral considerations from the offence. Use of dishonesty can, however, only be justified if it is exculpatory: the basis for criminalisation must remain a defined set of activities. The problem with the current English version of theft is that it is so broadly expressed that no such definition exists.

The nature of the harms that have been identified as historical bases for the crime of larceny and other offences also provide a clearer basis for a definition of theft. By making property-based harms less central to the justification of offences involving property, and by identifying specific harms that different types of actions cause within an overarching theft offence, it is possible to demonstrate that some risk of harm that corresponds to lived human experience occurs in each instance of theft. This means that there is no need to rely on the broader justification of protecting the regime, and also that the harms protected against are pre-legal harms, which are morally stronger. Of course, in the general understanding the key harm that is being protected against is pecuniary loss, but on this account that loss sits on top of the original forms of harm that justify the offence and may make the justification of criminalisation stronger in many instances. Importantly, the existence of the civil regime protecting property rights militates against breaches of such rights being a sufficient harm for criminalisation.

Indeed, the fundamental difficulty with relying on property rights to justify criminality – whether as a regime or individually – is that it becomes difficult to do anything other than criminalise all interferences with property rights. By insisting that the basis for criminalisation begins with an identification of a harm beyond mere property rights, and a notion of moral wrongness attached to that particular harm, the justification of property-related crimes opens up decisions on criminalisation to a much more detailed debate concerning what should and should not be criminalised.

For example, in relation to distribution of copyrighted digital music files, the Simester and Sullivan approach would suggest automatic criminalisation of such activity, unless technical arguments about permanent deprivation are deployed. On the approach suggested in this article, however, a harm beyond the infringement of copyright needs to be demonstrated. That harm might be to the music industry, or to the creators of the music; it might be based on an undermining of the right to control the use of one's creations, or it might undermine a right to make a living from one's labours. In any case, in identifying those harms more specifically, the supplemental norms that justify the protection of those harms become more obvious and open to debate. The moral wrongness of such interference with property rights is also considerably clearer, as it is more directly linked to a specific harm caused by the actions.

The malleability of the Harm Principle underlines its political role in debates about criminalisation. Simester and Sullivan's attempt to deploy it to justify property offences provides an important example of how the broader description of the nature of the harm, the more anodyne it becomes and the more it operates to provide a default basis for criminalisation for whole fields of activity. It is suggested that the Harm Principle is probably best used in narrower ways to prompt debate about specific crimes.

The more general importance of this approach is that it suggests that a variety of other offences may well contain a number of different harms against which they protect society. Many modern offences, such as theft, are the product of consolidation and simplification of older offences. It may be that these offences contain a range of different harms. If these are separately identified, a more nuanced understanding of the moral force and appropriate scope of such offences can be achieved.