This paper evaluates the offences of theft and dishonest against a variety of principles of criminal law making. [1]

## Theft – s 134

Theft is the dishonest dealing with another person's property without their consent,[2] with the intent to permanently deprive the rightful owner of that property or to otherwise seriously encroach on their proprietary rights. [3]

The offence of theft will be analysed with regard to the central model of criminal responsibility, and the principles of fair labelling and reliance.

The classic model of criminal responsibility encompasses five elements: a serious moral wrong worthy of public criticism,[4] a rational criminal actor acting under free will,[5] a volitional criminal act resulting in harm to others,[6] a 'morally blameworthy' mindset,[7] and the absence of moral or social justification.[8]

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[1] *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*').
[2] CLCA, 134(1).
[3] CLCA, 134(1)(c).
[4] Ngaire Naffine, 'Criminal Responsibility' in Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 3, 19.
[5] Ibid.
[6] Ibid, 20.
[7] Ibid.
[8] Ibid, 21.

Theft constitutes the first element of the model. Mindset is also addressed.[9] The act is that of theft, however s 134 also encompasses the act of receiving stolen property. It is arguable that in some cases the receipt of goods is a passive act rather than a criminal act. Receipt does not directly cause harm by depriving the victim of property, the initial theft does. Being the receiver of stolen goods might therefore constitute a 'crime of possession' or a 'status crime'.[10] This type of offence is viewed by Gardner as 'exceptional and troubling' because it prosecutes 'being' rather than 'doing'.[11] Contrarily, one might argue that goods would seldom be stolen if they were not readily received.

Section 134(4) exempts a person who honestly believes they have title to the property. Exceptions of social justification are not considered. Take a homeless woman who, compelled by her circumstances, steals food for her child. Necessity mitigates sentencing, but perhaps the woman is not accountable for the crime. Can she be considered a truly responsible subject who is exercising free choice? Arguably, as there are other legal avenues available to her.

The principle of fair labelling reflects the belief that the title applied to an offence ought to fairly represent the character of the offender's wrongdoing.[12]

Section 134 does not sufficiently differentiate offenders. Fair labelling would advise that two people guilty of stealing under $500 and over $5000 worth of goods respectively ought not to be assigned the same label. The Criminal Code of Canada successfully divides theft into two

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[9] CLCA, s 134(2).
[10] Naffine, above n 4, 20.
[11] Ibid, quoting John Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575.
[12] James Chalmners and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 219.

separate offences of over and under $5000.[13] Specific labelling such as this is necessary to communicate to the public 'the degree of condemnation that should be attributed to the offender'.[14] This matters particularly in the context of employment, to both offender and employer.[15] It would also assist with tailoring rehabilitation to offenders and communicate to future judges involved in further sentencing.[16]

The reliance principle states that citizens only have true liberty when 'they can rely upon the law to make informed... choices in full knowledge of the consequences of their actions'.[17] Otherwise, they are 'subject to the arbitrary power of the state'.[18] Leader-Elliot criticizes s 134 on the basis that it is vague and indeterminate.[19] He finds the CLCA definition of property 'not very helpful' in that it does not define the limits of the concept.[20] Mistaken consent and borrowing are also unclarified.[21] One might argue however that offenders are more likely to offend 'irrespective of the law rather than on account of it'.[22]

Overall s 134 is substantially conformant with the classic model. While the Act's definitions would better comply with the reliance principle they were more exhaustive, it would be impractical to list every conceivable interpretation of 'property'. In my view the departure from

[13] *Criminal Code of Canada 1985*, s 334.
[14] Chalmers and Leverick, above n 12, 226.
[15] Ibid, 234.
[16] Ibid, 232.
[17] KellieToole, 'Marital Rape in South Australia: *RvP, GA'* (2011) 35 Criminal Law Journal 237, 244.
[18] Ibid, 244.
[19] Ian Leader-Elliot, 'Offences of Dishonesty' in Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 106, 118.
[20] Ibid, 118
[21] Ibid, 122-123.
[22] Toole, above n 17, 246.

fair labelling is the most significant failing, but could be easily rectified in order to distinguish petty from major theft.

## Dishonest Dealings with Documents – s 140

A document is false if it misleads in relation to its own validity or the existence or terms of an arrangement to which it appears to relate.[23] An offence is committed if a person creates, possesses, or uses a false document with the intention of deceiving other people or machines.[24]

The s 140 offence is discussed in relation to the classic model of criminal responsibility, legal moralism and the harm principle.

Under s 140 the prosecution does not need to prove that the defendant 'obtained... a benefit or cause[d] a detriment by means of a deception involving a document'.[25] Rather the section draws strongly upon the mens rea element of the classic model of responsibility.[26] Simply creating or possessing a false document is sufficient, 'if [the defendant] is dishonest and intends to deceive and obtain a benefit or cause a detriment'.[27] It does not matter if their plan was bound to fail since 's 140 is about guilty intentions not forbidden results'.[28] This qualifies it as a crime of status as discussed above,[29] which calls to mind Mill's harm principle.

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[23] CLCA s 140(1).
[24] Ibid s 140(4).
[25] Leader-Elliot, above n 19, 130.
[26] CLCA s140(4).
[27] Leader-Elliot, above n 19, 130.
[28] Ibid.
[29] Gardner, above n 11.

The principle provides that because criminal law has the power to restrict our liberty, it should be used sparingly to prohibit actions that harm others.[30] The mere possession or even creation of a false document does not in itself harm others and therefore 'should not be criminalised, however much [it] might be... immoral'.[31] Arguably it causes indirect harm. While some find it impermissible to penalise people for 'behaviour which... is not... harmful, but... could lead to harmful conduct by others',[32] others insist that the law can be used more generally to protect the public interest.[33]

The latter perspective is supported by legal moralism, which asserts that it can be morally permissible for the government to restrict behaviours that cause neither harm nor offense on the basis that such actions constitute or cause evil of other kinds.[34] Therefore, legal moralists would argue that the elements of moral wrong doing and criminal act, which partially comprise the central model of criminal responsibility, are satisfied by s 140 even in cases of mere possession.

In general s 140 complies with the classic model. However I believe that the harm principle is more convincing than legal moralism as regards the existence of moral wrongdoing and a criminal act in the case of mere possession of a false document, and view this specific departure as unjustified.

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[30] Jonathan Herring, *Great Debates: Criminal Law* (Palgrave MacMillan, 2009) 2.
[31] Ibid.
[32] Ibid, 7, quoting Dennis Baker, 'Moral Limits of Criminalizing Remote Harms' (2007) *New Criminal Law Review* 370.
[33] Ibid, 5.
[34] Joel Feinberg, *The Moral Limits of The Criminal Law* (Oxford University Press, 1985) vol 1, 27.

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