The honest cheat: a timely history of cheating and fraud following *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67

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INTRODUCTION

The recent Supreme Court judgment of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 (hereafter '*Ivey*') is a reminder of how fraud and property offences continue to be an ontologically and conceptually problematic area of law. The Supreme Court took the opportunity in *Ivey* to reverse the long-standing but widely unpopular test for dishonesty as laid down in *R v Ghosh*[2], partly to reduce the relevance of subjectivity to the test of dishonesty, and partly to bring the civil and the criminal law approaches to dishonesty into line.

[2] R v *Ghosh* [*1982*] 3 WLR 110

In making this judgment, the Justices in *Ivey* held that dishonesty is a relatively recent addition to the mens rea of cheating. [3] In bolstering this claim, the Justices engaged in brief, but significant, analysis of the legal history of cheating and gambling, concluding that dishonesty was a twentieth century addition to theft, and by extension, this article argues, assumedly to other offences for which dishonesty constitutes part of the mens rea. This article employs more extensive legal historical research to demonstrate that the Supreme Court in *Ivey* was too quick in dismissing the significance of the historical roots of dishonesty. Legal historical research reveals that dishonesty has always been a central pillar of the actus reus of deceptive offences. In so readily concluding dishonesty to be a new addition to the offence of cheating, and consequently altering the test for dishonesty, the Justices have over-looked the significance of deception and dishonesty which lie at the heart of cheating.

In addition to dismissing the *Ghosh* test of dishonesty, the Justices held that any test for dishonesty must be consistent across civil and criminal law. This consistency has been imposed by ruling the civil test of dishonesty, as laid down in *Royal Brunei Airlines Sdn Bhd v Tan*[4], ought to be applied to the criminal law. The test was explained by Lord Hoffman in *Barlow Clowes*[5] and reproduced by the Justices in *Ivey*:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards

[3] *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, At para.48. The *mens rea* of 'fraudulently' was replaced with dishonesty in R v Williams [1953] 1 QB 660. This made the test about the state of mind of the accused, although the Justices then argue the trial judge in *Ivey* was right in deciding that what was cheating was a matter for the court and was an objective test (whether the act was cheating but not the *mens rea*).

[4] [1995] 2 AC 37

[5] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, Lord Hoffman at pp 1479-1480

> a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

The Justices in *Ivey* made clear that the future test of dishonesty, whether in criminal or civil courts, ought to be in line with the approach given in *Royal Brunei*:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."[6]

This article questions this blanket approach laid down in *Ivey* in so far as it raises significant challenges to the underlying rationale employed by the Justices in determining that the civil and criminal law ought to be in alignment. In demonstrating how eighteenth and nineteenth century jurisprudence actively distinguished between frauds in criminal law and contract law in the attempt to define criminal cheats, the need for judicial reflection surrounding the role of the criminal law in this area shall become apparent. Analysis of this jurisprudence and wider

[6] Above n 3, Para [74]

criminal law theory will challenge the Justices' assertion that the civil and criminal laws incorporating dishonesty must be conflated.

The *Ghosh*[7] test has formed the basis of dishonesty in the criminal law for nearly forty years. For an accused to be dishonest it must be shown that the reasonable person thought the action dishonest (an objective test), and that the accused appreciated that the reasonable person would find his actions dishonest (a subjective-objective test). The *Ghosh* test has been deemed problematic as it allows a subjective interpretation of dishonesty which, as shall be discussed below, the Justices held allowed a loophole for the genuine but dishonest thief who does not recognise that the reasonable person would believe their conduct to be dishonest. The Justices invoked historical research to dispose of this problematic test and, whilst it is laudable that the Justices engaged in legal historical research to explore the relevance of dishonesty to cheating, the Justices were evidently keen to use the case of *Ivey* to rectify a test of dishonesty which they felt was fundamentally flawed.[8] Consequently, the breadth and depth of the historical research was limited by the starting point of the Justices, that *Ghosh* was an anomaly in an otherwise consistent history of precedent in which dishonesty played no role in the mens rea of cheating offences.

Taking this standpoint, the Justices engaged in a narrow exploration of the history of cheating and the historical relationship between cheating and gambling.[9] However, had the Justices asked the question 'what role did dishonesty play in the offence of cheating?', they would

[7] R v *Ghosh* [*1982*] 3 WLR 110

[8] Karl Laird, 'Case Comment: Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club), *Criminal Law Review* 395, 2018

[9] It is acknowledged that the Justices, at para,43, make clear that cheating at gambling is sui generis but they then go on to use the discussion of cheating in gambling to open a far wider discussion regarding dishonesty in other offences. This article is engaging with this wider spirit of the judgment.

have seen that dishonesty has always been a central pillar of the *conduct* of cheating. In examining a wider range of sources than those considered by the Supreme Court, including court and practitioner records, this article demonstrates that dishonesty has always been an imperative element within the conduct of cheating.

This shall be demonstrated through the introduction of my novel doctrinal framework. This framework is derived from analyses of statute, case law, and contemporary commentary on the offences surrounding cheating and wider fraud offences from Tudor times[10] to the beginning of the nineteenth century. This framework consists of three defining doctrines of criminal fraud: a) that the fraud must be conducted through the use of an artful device; b) that this fraud must have some public harm; and c) that this fraud cannot merely constitute a fraud in contract law.

This article revisits the case of *R v Hinks*[11] as this judgment both illustrates the conflict between civil and criminal law principles that sit at the heart of the *Ivey* judgment, and also engages with the over-reliance upon dishonesty which characterises the current laws of theft and which set the tone for wider property offences.

The first section of this article introduces an overview of the case of *Ivey*, highlighting the elements of the judgment most relevant to my argument and how legal history was utilised within these arguments. The following section introduces the novel doctrinal framework for understanding the offence of cheating. By applying the framework, this article demonstrates how dishonesty has historically been a key element of the conduct element of cheating. Section three considers *Ivey* in light of this doctrinal framework, exploring how the Justices

[10] Cheating has an earlier history, though this article uses sources from the Tudor period onward.
[11] [2000] UKHL 53

might have handed down an alternative judgment had they engaged with a richer history of fraud and cheating.

Ivey v Genting Casinos (UK) Ltd t/a Crockfords

This breach of contract case began in the High Court and concerns the disputed gambling winnings of Mr Ivey. In 2012, Mr Ivey won £7.7m in the game of chance known as Punto Banco, a variation of Baccarat. Mr Ivey, along with a colleague, identified that certain packs of playing cards used at Crockfords' casino had distinctive markings which could help players distinguish face cards from numbered cards. This method of card reading is known as 'Edge-sorting'. It allowed Mr Ivey to have a competitive advantage in a game otherwise based upon chance.

Mr Ivey and his companion, Ms Sun, actively ensured they could distinguish between the cards through a series of deceptive measures. These measures included both Mr Ivey and Ms Sun feigning superstition in order to guarantee the same pack of cards with the particular markings was repeatedly used. In order to make certain they could see the backs of the cards clearly, Ms Sun also communicated to the unsuspecting croupier that the cards needed to be placed in a particular way 'to change luck'.[12] The croupier was unaware of why she was being asked to rotate the cards in a certain way and was innocently indulging what she believed were the whims of a superstitious gambler.

When Crockfords discovered the methods by which Mr Ivey won, they refused to pay the winnings on the grounds that there was an implied term in the contract that neither party would cheat, and that Mr Ivey had breached this term. In response, Mr Ivey claimed that

[12] Above n 3, Para [17]

edge-sorting was a recognised technique to improve one's odds and was not cheating. At trial, the judge found Mr Ivey to be truthful in his assertion that he was a professional gambler and 'advantage player', and that he saw edge-sorting as 'legitimate gamesmanship' rather than a dishonest practice.

At trial, Mr Justice Mitting held that edge-sorting was clearly a breach of the implied term of the contract not to cheat and held that the issue of cheating depended not on the state of mind of Mr Ivey but rather, whether this practice was cheating in law.[13] When the appeal reached the Supreme Court, the Justices engaged with three main questions. First, did Mr Ivey breach any regulations of the Gambling Act 2005? Second, were Mr Ivey's actions a breach of contract? Lastly, what was the significance of dishonesty to cheating?

The Supreme Court in *Ivey* held that Mr Ivey was not entitled to the winnings as he had, in fact and in law, cheated and thereby breached an implied term within the gambling contract. As stated above, the Justices took the opportunity in this civil case to alter the test for dishonesty across both the civil and the criminal law by laying down extensive obiter dicta regarding *Ghosh* and the appropriate test for dishonesty. The Justices relied heavily upon legal historical research to bolster this far-reaching judgment.

Ivey and the use of Legal History

Whilst discussion of precedent is common in appellate courts, *Ivey* paved the way for broader discussion of the history of cheating. By way of appeal, Mr Ivey sought to rely on a particular

[13] Above n 3, Para [27]

construction of the common law offence of cheating as laid down in East's Pleas of the Crown (1803) and restated by Viscount Dilhorne in *R v Scott*:

> "the fraudulent obtaining [of] the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public. It is not, however, every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law; ... it must be such as affects the public ...calculated to defraud numbers, to deceive the people in general."[14]

Mr Ivey claimed East demonstrated dishonesty to be a key element of cheating and, as Mr Justice Mitting at trial had ruled Mr Ivey not to be dishonest, Mr Ivey could not have cheated. By co-opting this nineteenth century construction of cheating in such a way, Mr Ivey allowed the Justices the opportunity to revisit the fundamental definition of cheating and the wider definition of dishonesty.

The Justices in *Ivey* ostensibly sought to understand the history, and capture the essence of cheating, by tracing the legislative origins of gambling and some of the corresponding case law relating to cheating.[15] The purpose of this exercise was to understand the role of dishonesty in the development of the cheating offence.[16] Notwithstanding the watershed effect of the Theft Act 1968 in the longer history of larceny and dishonesty, the Justices felt is worthwhile to explore the earlier origins of cheating offences in order to retrace the steps of dishonesty.

[14] *R v Scott [1975] AC 819*
[15] Ibid, paras [26-51]
[16] This was not the sole focus of the judgment, see Above, n 8

As a number of commentators have been quick to point out, the judgment in *Ivey* is surprising as the correctness of *Ghosh* was not raised in depth at any of the early stages of the litigation.[17] In fact, the *Ghosh* test had recently been considered in the case of *R v Hayes* and had been found good law.[18] Perhaps it was because there had been such little argument in the earlier hearings of *Ivey* that the Justices drew upon historical research in their dismissal of *Ghosh*. Moreover, as the Lord Chief Justice had very recently engaged in separate consideration of *Ghosh*, perhaps the Justices in *Ivey* co-opted historical research into their judgment in order to bolster their dismissal of a case recently deemed good law.

Whatever the rationale for using historical research, the Justices approach focused narrowly upon particular sources and failed to identify the significance of dishonesty to the conduct of cheating and to other fraud offences. One explanation for the Justices' failure to recognise the significance of dishonesty as a part of the conduct of the offence of cheating is because the Justices did not define cheating. In fact, the Justices held that defining cheating was 'unwise to attempt'[19] due to the 'extraordinary range of activities to which the concept may apply'[20] and also because of the 'inevitable truth that there will be room for debate at the fringes as to what does and does not constitute cheating.'[21]

The Justices do however identify some common traits of cheating including 'a deliberate (and not an accidental) act designed to gain an advantage in the play which is objectively improper, given the nature, parameters and rules (formal or informal) of the game'.[22] The Justices

[17] Above n 8
[18] R v *Hayes* [2015] EWCA Crim 1994; [2018] 1 Cr.App. R 10
[19] Above n 3, para [47]
[20] Ibid, para [38]
[21] Ibid, para [47]
[22] Ibid, para [47]

further held that a definition of cheating is not required in ascertaining whether dishonesty is fundamental to cheating. This is where the judgment takes a wrong turn as had the Justices engaged in a more thorough exploration of the definition of cheating through history, the significance of dishonesty to the conduct of cheating would have emerged.

In the rest of this article I directly critique the judgment in *Ivey* by demonstrating the level and depth of legal historical research which might have been undertaken by the Justices, and which would have allowed the Justices to appreciate the significance of dishonesty to the conduct of cheating.

A HISTORY OF CHEATING: A DOCTRINAL FRAMEWORK OF FRAUD

The great definitional ambiguity at the heart of cheating was as true 300 years ago as it is today. As a collection of offences, cheating and fraud are ontologically problematic. Fraud offences exist at the interface of civil law and criminal law and this interconnectedness results in fraud and financial misconduct often being viewed with ambivalence in the twenty-first century.[23] The judgment in *Ivey* has not lessened this ontological ambiguity and has potentially exacerbated the problem of how criminal deception is viewed within the wider legal framework.

Historically, fraud offences, of which cheating is one, can be defined both positively and negatively: what fraud was, and what fraud was not. Before analysing cheating, a definition

[23] For modern discussions of fraud and white-collar crime see: John P. Locker and Barry Godfrey, Ontological Boundaries and Temporal Watersheds in the Development of White-Collar Crime. *British Journal of Criminology* (2006) 46, 976-992; S.P Shapiro, Collaring the Crime, not the Criminal: Reconstructing the Concept of White-Collar Crime. *American Sociological Review*, Vol.55, No.3 (Jun 1990) pp.346-365; E.D. Sutherland, Is "White Collar Crime" Crime? *American Sociological Review* Vol.10 no.2 (1944) pp.132-139; Wilson, Sarah, *The Origins of Modern Financial Crime. Historical foundations and current problems in Britain* (Routledge, 2014); Gary Wilson and Sarah Wilson 'Can the general fraud offence 'get the law right'?: some perspectives on the 'problem' of financial crime. *Journal of Criminal Law* (2006-2007).

must first be outlined. The act of positively defining fraud introduces my three central doctrines of fraud: (i) that a fraud must be conducted through the use of an 'artful device'; (ii) a criminal fraud must cause harm which the reasonable member of the public would not have suffered; (iii) a criminal fraud must be something other than a breach of contract.[24]

These three doctrines are complex and nuanced. For example, a fraud causing public harm could be that which 'such…common prudence would not be sufficient to guard against'.[25] This doctrine contains the ancient principle that the law should not act to protect a fool.[26] Further, the doctrine which states a criminal fraud cannot be a breach of warranty at contract law includes an underlying principle that the victim of a fraud must demonstrate having undertaken some reasonable steps to verify the fraud. At points these three doctrines interconnect.[27]

When identifying a positive definition of cheating, it is important to recognise the negative definition; what cheating and fraud were not. Fraud offences have always significantly interconnected with other criminal offences. Across the eighteenth and nineteenth centuries, there was potential for interconnection between a number of offences including, but not limited to, larceny, embezzlement, forgery and uttering, as well as between offences of fraud such as cheating, obtaining goods by false pretences, false personation, and fraudulent offences against public bodies.[28] More contemporary understandings of fraud delineate

[24] An earlier formation of these doctrines can be found in Cerian Charlotte Griffiths, *Prosecuting Fraud in the Metropolis, 1760-1820*. (Unpublished doctoral thesis, University of Liverpool, 2017)
[25] *R v B. Lara*, 6 Term Reports 565; 101 E.R. 706
[26] See below
[27] Where it is possible, each doctrine will be addressed separately. However, due to the ontological closeness of the doctrines, examples will be provided that could apply to one or more of the doctrines.
[28] This interconnection of offences still formed a central part of the discussions of the 8th report of the Criminal Law Revision Committee which led to the introduction of the Theft Act 1968.

between fraudulent offences and those of theft,[29] but historically this was not so clearly the case. This over-lapping between fraudulent offences and other property offences acts to complicate the treatment, perceptions, and enforcement of fraud offences, due. Providing a positive definition of fraud, or at least identifying the central characteristics and doctrines of fraud, helps to untangle the ontological ambiguity caused by the relationship between deception and other offences.

Common law cheating has a long history. As a distinct offence, cheating was an ancient misdemeanour that can be found scattered throughout English legal history. It was from the common law offence of cheating that the doctrines underpinning later fraud offences developed and it is because of this status as the common law seed of fraud that we must continue to engage with the offence of cheating today. The common law offence was commonly used through the eighteenth century and into the twentieth century due to the shortcomings of contemporary statutes. In particular, cheating was utilised where the subject of the fraud was not money or goods, but rather, financial instruments.[30] Due to the statutory laws of theft and fraud being consistently deemed in need of reform, the common law continued to be relied upon.[31]

The first of the doctrines of fraud, the use of the artful device, refers to what would now be considered the *actus reus* of the offence; the mechanism by which the cheat was achieved. The other two doctrines refer to the way in which fraud offences operated and were constructed by jurisprudence. The need for public harm of the cheat is central to the socio-

[29] Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016) p.204
[30] Above n 25
[31] Above n 29, p.218

legal policies surrounding fraud, and the differentiation between a criminal cheat and a breach of contract spoke to the changing role of the criminal and civil law through the eighteenth century to the modern day.

The requirement of the artful device

The artful device of a cheat was the mechanism by which the cheat was carried out and it is this first doctrine of fraud where we most clearly see the relationship between dishonesty and the actus reus of cheating.

Serjeant Hawkins[32] described cheating as *"*deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty*".[33]* 'Honesty' in Hawkins' context was not a reference to the mental element of the crime of cheating. Rather, Hawkins refers to the deceitful practice, or the artful device which is itself against common rules of honest behaviour.

Later legislation, including the Insolvent Debtors Relief Act 1801, contextualised Hawkins' definition of cheating as a crime used by: 'evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, fraudulently obtained money, goods, etc'.[34] Here we observe that the heart of fraud offences is the behaviour and the method by which property was obtained. The 'artful device' is the subtle stratagem by which the goods or benefit are obtained.[35]

[32] Serjeant William Hawkins was an important leading commentator on the criminal law in the early eighteenth century.

[33] 1 hawk c.71 s.1 quoted in Cited in J.W Cecil Turner (ed), *Russell on Crime* Vol.2 11th Ed. (London, Stevens & Sons Limited, 1958) p.1330

[34] 41 Geo. 3, c. 70

[35] Through the eighteenth and into the nineteenth century the phrase 'false pretence' began to replace the 'artful device'. See for example: *The King v Gill and Henry* 106 E.R. 341; (1818) 2 B. & Ald. 204; *Noble v Adams*

Such a device is not the physical seizing of property[36] but is rather, some deceitful manner, or 'crafty means'[37] by which property is obtained. The definition of an 'artful device' was broad and flexible, allowing for the accommodation of a range of possible mechanisms. An illustrative example of the artful device was the exploitation of information to trick shopkeepers into handing over goods or extending credit. There are dozens of such examples in the quasi-official records of the Old Bailey, the Old Bailey Proceedings.[38] One such example is that of Stephen Willoughby who was prosecuted in 1766 for obtaining gin by false pretences. [39] Willoughby committed the fraud by claiming to be sent by his master, Mr Bicknall. Mr Bicknall was a known customer to the prosecutors, Messrs. Thomas and John Isherwood, distillers in Aldersgate Street and Willoughby, and took advantage of this to claim goods, ostensibly on Mr Bicknall's behalf. Suffice to say, Willoughby had no authority to obtain the gin.

There are many such examples of the use of the artful device. Such examples from the eighteenth century often entailed the extraction of information that would later be used to swindle third parties. These forms of artful device have been historically perceived as particularly invidious as they involved 'those who trick you out of your knowledge, by what they commonly call "sucking your brains".[40] For example, a particularly audacious swindle

129 E.R. 24; *R v H D Perrott* 105 E.R. 422; (1814) 2 M. & S. 379; *R v Jackson and Another* 170 E.R. 1414; (1813) 3 Camp. 370

[36] Fraud offences have a close relationship with larceny, the essential difference being the missing element of seizure of goods. In the simplest terms, the offences of larceny required that without the consent of the owner, a thing must be seized (*cepit*) and then carried away (*asportavit*). Fraudulent offences required the victim to voluntarily part with the goods. For a history of larceny see: Above n 33; G. Fletcher, The Metamorphosis of Larceny. *The Harvard Law Review*. Vol.89, no.3 (Jan 1976) pp.469-530.

[37] Above n 30

[38] These records can be found at https://www.oldbaileyonline.org/

[39] *OBP,* Oct 1766, trial of Stephen Willougby (t17661022-58)

[40] John Fielding, *Extracts from such of the penal laws as particularly relate to the peace and good order of the Metropolis* 2nd ed.- (T.Cadell, 1763)

committed through the use of inside information was carried out by Matthew James Everingham who, in 1784, obtained a number of law texts and criminal practice books from a member of the Middle Temple.[41] Everingham knew of a companion of the victim and approached him under the pretence of being sent by his master, the said companion. The knowledge of the victim's associates was all Everingham needed to obtain the texts.[42]

Judges were clearly flexible in their application and interpretation of what stratagem constituted an 'artful device':

> That the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie.[43]

One caveat to the mechanism was that, properly speaking, mere lying was not sufficient[44] and this requirement, in line with the statute, was frequently applied: '*…there must be some extrinsic token besides the bare assertion of the defendant charged to have been used by him in order to effectuate his fraudulent intent'.*[45] Whilst this ostensibly appears to be a restriction on circumstances within which an artful device could be found, judicial interpretation of what constituted a 'token' was greatly extended to criminalise cheats which did not fit the statute. For example, the 1704 case of *The Queen* v. *Macarty and Another*[46], in which one of the defendants pretended to be a broker and the other a Portuguese wine merchant, in order to

[41] *OBP,* Jul 1784, trial of Matthew James Everingham (t17840707-116)
[42] Had Everingham read the texts he obtained, he may have avoided the seven year transportation sentence he received.
[43] As cited Above n 30
[44] Robert Shoemaker, *Prosecution and Punishment* (Cambridge University Press, 1991)
[45] Above n 30
[46] 6 Mod 301 and 2 Lt. Ray. 1179

obtain a parcel of hats in return for wine. In reality, Macarty gave him a mixture of stale beer and vinegar. The false token was taken to be that one pretended to be a broker and the other a merchant. This is a very broad understanding of what might be a false token. The artful device in this instance looks like a mere lie, that being that Macarty was a wine merchant.[47]

The public nature of the criminal cheat

The second doctrine at the heart of criminal fraud and cheating was the need for the act to be of a public nature. This doctrine speaks to the fundamental purpose of the criminal law as an institution existing to protect the wider community and not merely to uphold individual property rights.[48] Historically, for a fraud to be of a public nature, it had to be demonstrated that anyone could fall foul of the cheat, not only that individual. The crime was thereby one that required a wider social harm; a fraud that could have been committed against any reasonable person taking reasonable steps to protect him or herself.

This doctrine was consistent with the long-held conviction that the law should not act to protect a fool, and the victim of a cheat could only bring a successful case if there was no way of verifying the cheat for themselves.[49] A complainant of a cheat must have shown that the accused did 'effectuate his fraudulent intent, such as common prudence would not be sufficient to guard against'.[50] The relevance of the behaviour of the victim reveals both the close connection between the criminal law and the jurisprudence of contract law[51], and also

[47] This approach was further confirmed in the similar case of *R v Govers* 96 E.R. 854; (1755) Say. 206.

[48] Lindsay Farmer, Criminal Law as an Institution. Rethinking Theoretical Approaches to Criminalization In: Duff, R.A., Farmer, L., Marshall, S.E., Renzo, M. and Tadros, V. (eds.) *Criminalization: The Political Morality of the Criminal Law.* (Oxford University Press: Oxford, 2014) p. 84

[49] *Young v the King* (1789) cited in William Holdsworth, *A History of English Law*, Vol XI, 1st Ed (Metheun & Co, 1938) p.533; *R v Grantham* 88 E.R. 1002; (1709) 11 Mod. 222; *Rex v. Bryan* , 2 Stra. 866; *Rex v. Munoz* , 2 Stra. 1127; *Rex v. Nehutt* , 1 Salk. 151

[50] Above n 30

[51] For discussion of the relationship between contract and criminal law fraud see below.

the significance of blame to the moral core of the criminal law. The criminal law was evidently not to be invoked where the victim had invited such loss through negligence: "It was not a matter criminal, but it was the prosecutor's fault to repose such a confidence in the defendant."[52]

Morality makes a further appearance in the jurisprudence surrounding the *criminal* cheat in that the common law was widely used to punish behaviour seen as unethical or deceptive.[53] In 1789, Ashurst J, in reference to the 1757 Act which codified cheating, held that: 'The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind.'[54] In the same case, Lord Kenyon addressed the strict doctrine of not protecting a fool and reflected the significance of immorality to the criminal cheat:

> '…he [the complainant] was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away'.[55]

What constituted a public harm was open to judicial discretion and the majority of case law in this area pertains to trade and the extension of credit. In particular, judges were open to extending the definition of a public harm, and thus hold such action criminal in instances that

[52] *Nehuff's Case*, Salk cited by Mr Justice Lawrence above n 25
[53] *R v Higgins* (1801) 2 East 5
[54] See below
[55] *John Young, S. Randal, W. Mullins, and J. Osmer v The King*, 3 Term Reports 98; 100 E.R. 475

threatened commercial relations.[56] Consequently, the public nature of a fraud was often interpreted as being a fraud that caused some socio-economic harm:

> 'It is well known that a very considerable share of the money transactions in the commercial world is carried on by means of the credit given to drafts upon bankers; and therefore any fraud which tends to impeach such a security is a matter of public concern, as it must necessarily impede the usual course of circulation'.[57]

This judicial desire to protect trade and credit was reflected in later legislation which defined cheats and obtaining goods by false pretences as those which led 'to the manifest prejudice of trade and credit'.[58] Lying and cheating between individuals was deemed to fall under other areas of law such as contract, not criminal law,[59] and those believing themselves cheated were equally, if not more likely, to pursue their claim in the civil courts.[60]

From the second half of the eighteenth-century, cheats that undermined day-to-day commercial activities were far more likely to be deemed criminal than civil. The interpretation and enforcement of the common law of cheating demonstrates that this motivation to protect conditions of commercialism had existed in the law before the period under consideration in this article, and continued in earnest well into the nineteenth century.[61]

Whilst the use of the criminal law by the judiciary to demonstrate and reflect the socio-economic harm of some cheats is illustrated by the jurisprudence surrounding false weights

[56] See for example: *R v Wood* 93 E.R. 81; (1742) Sess. Cas. K.B. 80
[57] Above n 30
[58] 41 Geo. 3, c. 70 (Insolvent Debtors Relief Act 1801)
[59] Above n 33 p.1334
[60] Joseph Chitty, *A Practical Treatise on the Criminal Law Vol.3* (Messrs Butterworth and Son, 1816) p.994
[61] James Taylor 'Watchdogs or apologists? Financial journalism and company fraud in early Victorian Britain', *Historical Research* Vo.85, no.230 (November 2012)

and measures, not all judges found a crime where a fraud affected a commercial transaction. An illustrative example can be found in the 1775 case of *R v William Bower* concerning the knowing exposure to sale, and selling of wrought gold under a sterling alloy.[62] *Bower* reflects how courts were generally keen to find a public cheat in cases of trade. However, one member of the bench in *Bower*, Justice Aston, believed there was an important distinction between selling by false measure and selling under the standard; selling by false measure was harder to check, but merely delivering a lesser amount and the complainant not checking was a matter of contract. Cheating was regularly applied to cases involving false weights and measures[63] as purchasers rarely had the opportunity to verify their purchasers at the point of sale. Because of this, if a cheat was carried out during trade, it was often treated as a public ill and thus, an indictable cheat.[64] Lord Mansfield in the case of *R v Wheatley* strongly reminded the court that the criminal law could not be co-opted in every instance of cheating, only where *any* member of the public could have fallen foul of such a fraud:

> 'And that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because *it is only an inconvenience and injury to a private person, arising from that private person's own negligence* [my emphasis] and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.'[65]

[62] 98 E.R. 1110; (1775) 1 Cowp. 323
[63] *R v Jones* (1704) 2 Lt Raym 1013
[64] Above n 56
[65] Per Lord Mansfield, *R v Wheatly*, 97 E.R. 746; (1761) 2 Burr. 1125

The requirement for the cheat to result in public harm reveals the rationale behind the role of the criminal law; a preoccupation with the result of a fraud, not with the morality of the act itself.

A further significant area of jurisprudence which shaped the criminal offence of cheating was that concerning cheating at gambling or gaming. Because of the historic acceptance of gambling at various points in time, the common law was often stretched to great lengths to ensure that cheating in gaming was defined as creating a public mischief and thus, indictable under the law. The purpose of such an approach was to ensure that gambling and gaming were regulated by the criminal courts in order to deter cheating. An illustrative example of this is the 1704 prosecution of two individuals who agreed to the outcome of a foot race in order to defraud a third person.[66] This was deemed a public nuisance as it undermined the trust assumed in every day gambling and was 'publick [sic] in its consequences'.[67] This very early example of match-fixing reflects the enthusiasm with which the common law doctrine of cheating was applied. There are many eighteenth-century examples of courts upholding agreements for gambling, even where the subject matter was held to be deeply distasteful. One such example is the 1778 case of *De Costa v Jones*[68], in which the parties wagered over the gender of a third person. At trial, the evidence had been thrown out on grounds of public indecency but at the King's Bench is was held:

> '… Courts of Justice do not reject the contracts of parties, because the subject matter of them happens to be indecent or indecorous. What can be a greater violation of all decorum, than for two sons to run their fathers' lives against each other: and yet the

[66] *R v Orbell* (1704) 6 Mod.42
[67] Ibid
[68] 98 E.R. 1331; (1778) 2 Cowp. 729

> case of The Earl of March v. Pigot, Trin. 11 Geo. 3, 1 was entertained, and solemnly adjudged in this Court, in favour of the contract, without a thought or idea of its being liable to any such objection.'[69]

The case law surrounding cheats is preoccupied with the distinction between criminal and civil law and the key distinction between the two was the public nature of the fraud. Lying and cheating between individuals was deemed to fall under contract law, not criminal law.[70] Consistent with this approach, the courts would not allow the criminal law to be co-opted by cheats, against cheats. The 1758 case of *R v Peach et al*[71] saw a group of gambling swindlers levelling accusations of cheating against others gamblers. The court did not hesitate to refuse an indictment for accusers who 'appeared to be a parcel of infamous cheats and gamblers'. This is not to say that courts were opposed to gambling *per se*, merely that the criminal law was actively seen as a forum to protect the public good, not to uphold complaints between individuals, particularly individuals seen as acting immorally. In addition to criminal cheats requiring a dimension of public harm, cheats were actively defined in opposition to misrepresentation and failure to honour contracts and this forms the final of the three doctrines underpinning frauds.

Beyond the contract: criminal cheating and 'mere breach of warranty'.

It is when considering the third doctrine of fraud, that a criminal cheat must be more than a breach of contract, that a definition of the criminal cheat emerges.

[69] Ibid
[70] Above n 33 p.1334
[71] 97 E.R. 442; (1758) 1 Burr. 548

The offence of obtaining goods or monies by false pretences is perhaps the clearest illustration of an offence that existed at the interface between fraudulent criminal offences and the civil law. As illustrated above, cheating is the root offence of all fraud offences from before the sixteenth century and consequently, the jurisprudence applies across fraud offences. A contractual fraudulent misrepresentation might look very similar to a false pretence given to obtain property criminally. The jurisprudence surrounding cheating within the criminal law in the eighteenth-century often centred around whether the act was indeed a criminal cheat, or whether it was a breach of warranty.

During the sixteenth century, the Star Chamber created a raft of precedent concerning fraudulent activities, in particular the criminalisation of fraudulent misrepresentation made during the formation of contracts.[72] This close relationship between criminal and contract law is an understandable one and the doctrines underpinning both contract law and criminal law intersect when applied to false pretences. One such doctrine is the requirement in contract law for any contractual representation to be of existing fact and not merely a promise to act in the future. The practical application of this doctrine can be best seen in the case of *R v Jennison* in which a man promised to marry a wealthy spinster.[73] Jennison took money from the woman in order to set up house for the two of them for when they would be married. It later transpired that Jennison was in fact already married and never had any intention of marrying the woman. The court found Jennison to have obtained money criminally through a false pretence, not the pretence that he was going to marry the woman, but the pretence that he was single and in a position to marry. The promise to marry was a statement of future

[72] William Holdsworth, *A History of English Law*, Vol V, 3rd Ed (Metheun & Co, 1945)
[73] 1862 L & C. 157

fact and thus could not be a false pretence; the pretence that he was unmarried however was a statement of existing fact.

Case law across the criminal courts consistently demonstrates that judges were keen to distinguish between fraud and breaches of warranties that they felt ought to be pursued in the civil courts.[74] Lord Ellenborough in particular delivered a series of judgments in which he stressed the need to distinguish between criminal false pretences, and breaches of contract.[75] Lord Mansfield[76] was equally aware of the interconnection of criminal and contractual actions and was loath to 'sustain an action simply upon misrepresentation'.[77] At the beginning of the eighteenth century, judges were far more likely to find cheats to be a breach of contract than a criminal cheat.[78] In 1733, Chief Justice Raymond held that even in cases of deliberate deceit as to the weight of goods, this constituted a private contract and was therefore not indictable.[79]

One explanation for favouring the civil law can be found in the 1719 case of *Wilders* in which the possibility of genuine mistake by the seller played a central role in the reluctance to use indictments to tackle false weights and measures.[80] However, the eighteenth century saw a

[74] See for example: *R v Driffeld* 96 E.R. 833; (1754) Say. 146; *Emanuel v Dane* 170 E.R. 1389; (1812) 3 Camp. 299; *Noble v Adams* 129 E.R. 24

[75] See in particular: *Emanuel v Dane*, 170 E.R. 1389; (1812) 3 Camp. 299; *R v Pywell and others*, 171 E.R. 510; (1816) 1 Stark. 402.

[76] Lord Mansfield was a deeply influencial lawyer and politician in the eighteenth century, acting as both Solicitor and Attorney General. For an overview of Mansfield see Kayman, Martin A, 'The Reader and the Jury: Legal Fictions and the Making of Commercial Law in Eighteenth-Century England' *Eighteenth Century Fiction*, Vol.9, No.4 (July, 1997) pp.373-394.

[77] *Hamar v Alexander*, 127 E.R. 618; (1806) 2 Bos. & P. N.R. 241

[78] See for example: *R v Driffield* 96 E.R. 833; (1754) Say. 146

[79] *R v Pinkney*, 25 E.R. 593; (1733) Kel. W. 244

[80] 88 E.R. 1057; (1719) 11 Mod. 309

shift in judicial approaches to the extension of the criminal law in this area, and a broadening in the willingness to interpret frauds as criminal.

This change in jurisprudence during the eighteenth century speaks to two fundamentally interconnected issues: the purpose of the criminal law, and how the criminal law was employed to pursue socio-economic ends. By shaping the role of the criminal law in sanctioning particular types of deceptive behaviour, eighteenth century jurisprudence suggests a moral distinction between criminal and civil cheats. This moral judgement was deployed against prosecutors or complainants of frauds, as well as the accused. As stated above, the criminal law was not perceived as being appropriate to address all frauds and where the victim had not taken adequate steps to protect themselves against the deception, the criminal courts were loath to uphold their prosecution.[81] This distinction in the purpose of the criminal law was arguably more fundamental with regard to property offences. Lindsay Farmer has suggested the aim of the criminal law to be less about protecting private property, which was the purview of the civil law, and more about the protection of the system of property rights.[82] Without this distinction between private property and public wrongs, there can be no public function of the law.[83] This was as true in the eighteenth century as it is today. The distinction between protecting individuals and protecting a commercial system reflects the socio-economic motivations of the eighteenth-century judiciary.

The socio-economic motivations for redefining frauds as criminal over civil developed as the judiciary acted to secure the conditions required for commercial activity. By using criminal

[81] This was reiterated as late as the Criminal Law Commissioners 1834, 4th report. For more details see Above n 29 p.215
[82] Above n 29 p.229; see also above n 48
[83] Ibid p. 84

sanctions to address dishonesty in commercial dealings, the judiciary was declaring such actions to be of such social and economic harm, that this harm affected the entire community, and not just the individual. This rationale has been discussed above when considering how the eighteenth-century judiciary relied on concepts of public harm in order to define a criminal fraud. However, this distinction was at the heart of defining criminal cheats in opposition to civil wrongs and mere breaches of contract.

Having set out the fundamental doctrines underpinning the history of cheating, the Supreme Court decision in *Ivey* can now be revisited to assess whether the judgment aligns with the historical precedent.

REVISITING *IVEY*

The two most significant obiter dicta from *Ivey* were that first, dishonesty is a relatively new addition to cheating.[84] The second conclusion was that whatever test of dishonesty is accepted, it needs to be consistent with the civil law.[85] Had the Justices undertaken more rigorous research into the history of cheating, the first of these conclusions may still have been reached, but for different reasons. However, more radically, a history of cheating could have been utilised fundamentally questioning the requirement of a dishonest mens rea at all. As dishonesty is an element of the statutory definition of theft, I am not suggesting the Supreme Court could have removed this from the offence, but at a time when dishonesty is being removed from some offences such as the criminal cartel offence[86], the Justices could have embraced *Ivey* as an opportunity to signal to Parliament and law reformers the need for

[84] Above n 2 para [48]
[85] Ibid para [74]
[86] S.47 of the Enterprise and Regulatory Reform Act 2013.

a root and branch review of dishonesty. In applying the doctrinal framework introduced in this article, the Justices would have recognised how dishonesty is integral to the *conduct* of cheating, and law reformers may reflect upon whether an additional culpable mind, beyond the intent to carry out the dishonest act, is necessary.

Equally significantly, the second of the conclusions, that there is no reason why the civil and criminal tests for dishonesty should be different, would not have been reached as the historic jurisprudence demonstrates how criminal cheats have been, and ought to be, defined as opposed to, and other than, civil cheats.

***Ivey* and the significance of dishonesty**

The Justices in *Ivey* were eager to overrule the judgment in *Ghosh* and did so by co-opting a dramatically abbreviated history of cheating and fraud. The doctrinal framework of fraud introduced in this article demonstrates that dishonesty is indeed a newer addition to the mens rea of deception offences, but has a far longer history forming part of the actus reus of such offences.

In eighteenth century criminal law, the mens rea of a cheat or fraud was simple intent. 'Fraudulent intent' was often a short-hand for the mens rea of illegally taking[87] but this was really used to differentiate between lawful and unlawful appropriation rather than adding a mental element to the act. Intention is further elaborated by such phrases as 'deceitfully intending'.[88] There is little case law or jurisprudence that defines or focuses upon the mens rea of cheating, but commonly, variations in the lexicon of indictments at the time included:

[87] Above n 29 p.216
[88] Above n 25

'unlawfully, knowingly, and designedly[89]'; 'that he, being a wicked and evil disposed person, intending to cheat and defraud[90]'; 'being an ill designing person, of dishonest conversation, not minding to gain his livelihood by honesty, did falsely pretend[91]'. Lord Ellenborough restated the need to show the mens rea of fraud, that being 'knowingly and designedly', and went on to detail how: 'A man may innocently obtain goods on a pretence which is false, if he do not know that it is false: as if a servant, ignorant of the deceit, be sent by his master for goods upon a false pretence, which he directs him to make.'[92] The focus on deceit is crucial as deceit is not synonymous with dishonesty. To deceive is to act, this does not speak to the mental state of the deceiver. Again, the fundamental definition and construction of cheating is the actus reus and the artful device. The only reference to the mens rea of the accused beyond intent is that they be 'evil disposed'. In modern vernacular this disposition is closer to intent than to any test of dishonesty. It is the act which is dishonest, not the accused.

The significance of any mens rea to the criminal cheat and wider property offences is still a hot topic and one which sits within wider criminal law theory. Stuart Green has written at length about the moral core of fraudulent and white-collar offences.[93] Green contests that any mens rea may prove an 'unusually decisive' factor in determining whether an act is criminal or not.[94] This is borne out in case law, particularly in the case of *R v Hinks*. *Hinks* is another deeply contentious criminal case which held that criminal appropriation could be satisfied, even where this appropriation could not be vitiated in contract law.[95] One of the

[89] *OBP*, February 1760, trial of John Ambery (t17600227-19)
[90] *OBP*, June 1769, trial of John Lutmore (t17690628-63)
[91] *OBP*, December 1769, trial of Roger Prate (t17691206-47)
[92] Per Lord Ellenborough in *R v Tomkins* (1807) 8 East 180; 103 E.R. 311
[93] See in particular Stuart P. Green, *Lying, Cheating, and Stealing. A Moral Theory of White-Collar Crime* (Oxford University Press, 2006)
[94] Ibid p. 32
[95] For a more in-depth discussion of *R v Hinks* [2000] UKHL 53 see Stephen Shute, 'Appropriation and the Law of Theft,' *Criminal Law Review* (2002) pp.445-458; Alan L. Bogg and John Stanton-Ife, Protecting the

more common criticisms of *Hinks* is that the criminal element of appropriation, as required by the law of theft, has been reduced to vanishing point as the accused can criminally appropriate property even when a valid gift has been made. A consequence of this is that the mens rea of theft, particularly the requirement of dishonesty, is having to do the heavy lifting when it comes to criminalising the act itself. The result is that the accused's criminal liability is determined by the trier of fact's assessment that the accused acted dishonestly. According to Green's approach, this may not be problematic in the overall logic of the criminal law as it is often the mens rea which delineates between the criminal and the non-criminal.[96] Mental elements of offences such as dishonesty are, as Richard Tur would argue, 'standard-bearing concepts' within the criminal law.[97] However, a number of fundamental criticisms emerge in relation to the reliance on mens rea to determine guilt. One such criticism, and one which the Justices in *Ivey* considered, is that triers of fact, which are sometimes juries, can have differing concepts of dishonesty and this results in the law being applied inconsistently.[98] Not only does this make the outcomes of trials unpredictable, but this unpredictability has been argued to undermine the rule of law.[99] This criticism speaks to the wider issue of jury trials and triers of fact. The Justices did not engage with the purpose of the jury trial, that an element of lay

Vulnerable: Legality, Harm and Theft. *Legal Studies* Volume 23, Issue3, Pages 402-422; Beatson and A.P Simester, 'Stealing one's own property' *Law Quarterly Review,* 1999, pp.371-376; S Gardner, 'Property and Theft' [1998] *Criminal Law Review*, pp.35-43

[96] See above, n 93

[97] Richard Tur, 'Dishonesty and the Jury: A Case Study in the Moral Content of Law' in A. Phillips Griffiths (ed.), *Philosophy and Practice* (Cambridge, 1985), pp.75-96, at p.95. See also Stephen Shute, 'Appropriation and the Law of Theft,' *Criminal Law Review* (2002) pp.445-458

[98] This point was also engaged with in great length by the Law Commission in *Legislating the Criminal Code: Fraud and Deception* (Law Com no.155 1999)

[99] Alan L. Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft.' *Legal Studies* Volume 23, Issue3, Pages 402-422. P.407

participation in the criminal trial is allowed for the very reason of judging community standards of behaviour.[100]

With so much weight being placed on the mens rea for property offences, it is concerning that there persists confusion between dishonesty and deception. Confusion which permeates academic and judicial discussion of dishonesty. Green rightly claims the defining characteristic of fraud to be deception, but he also equates issues of mens rea with deception.[101] Green's analysis, though thoughtful, illustrates how academics, and indeed judges, often fall foul of conflating mens rea with the *act* of deception. This is perhaps not surprising as whilst a useful framework for making sense of the criminal law, the actus reus-mens rea divide is problematic in that it applies a simplistic binary of conduct and mental state to a series of complex and interconnected principles that make up a criminal act.[102] Moreover, the law itself makes it easy to confuse issues of actus reus and mens rea, and issues of mens rea with issue of fact. For example, s.2 (1) (b) of the Theft Act 1968 states that a person is not dishonest if she believes she would have the consent of the owner. This has led even Law Lords to confuse the issue of the mens rea of believing herself to have a right in law, and actually having a right in law.[103] In the case of *Hinks*, Lord Hutton, in relation to s.2(1)(b) of the Theft Act 1968 states: 'It follows, a fortiori, that a person's appropriation of property belonging to another should not be regarded as dishonest if the other person actually gives the property to him.' Whilst there is logic to this step, Lord Hutton consequently conflates the factual issue of whether she

[100] This much wider discussion cannot be engaged with sufficiently in this forum but for a more detailed discussion see Richard Tur, above n 97

[101] Ibid p. 51

[102] See in particular Paul H Robinson, 'Should Criminal Law Abandon the Actus Reus-Mens Rea Distinction?' in Shute, Gardner, and Horder, *Action and Value in Criminal Law* (Clarendon Press, Oxford, 1993)

[103] Above n 10

would have the consent of the owner, with the mens rea element of whether she *believed* she had the consent of the owner.

The Justices in *Ivey* acknowledged the importance of some 'deception' to a cheat, and went so far as to hold that where there is such a 'deception', it is easy to find dishonesty.[104] This confused reasoning lead the Justices to tie themselves in knots when trying to distinguish between deception and dishonesty.

Ivey contains some interesting thought experiments surrounding when a cheat could in fact be honest. The examples given include the runner who deliberately trips an opponent, and a stable lad who alters the watering of a horse to ensure a slower race.[105] The Justices come to the conclusion that these acts would only qualify as dishonest should there have been an 'altogether artificial representation to the world at large' that conditions were such as to ensure fair competition.[106] This construction of cheating is one which could be avoided if the historical understanding of cheating is embraced: that the act of cheating, or the artful device, is inherently dishonest and therefore, an additional mental element of dishonesty is not required. The Justices acknowledge this argument when stating: "Some might say that all cheating is by definition dishonest. In that event, the addition of a legal element of dishonesty would add nothing."[107] This reasoning could be extended to encapsulate factual dishonesty and thereby side-step the 'unnecessarily complic[ation]' which the Justices sought to avoid.[108]

[104] Above n 3, para [45]
[105] Ibid, para [45]
[106] Ibid, para [45]
[107] Ibid, para [49]
[108] Ibid, para [49]

The central issue in *Ivey* was whether Mr Ivey had intentionally deceived the casino and thereby breached an implied term of the contract, that being not to cheat. As the artful device has long been the heart of the cheat, so too are such devices pivotal in the case of *Ivey*. Mr Ivey and his accomplice utilised a number of artful devices in order to win multiple hands of Punto Banco. These included: requesting the cards be placed at a particular angle; requesting the same manufacturer of cards be reused and later, requesting the exact same cards be used the following day; requesting a machine be used to shuffle the cards thereby ensuring the positioning of the cards did not change; and pretending to be superstitious in order to excuse unusual requests.

Unintentionally, the Justices are consistent with eighteenth century jurisprudence concerning the artful device in that they hold only the positive acts of deception by Mr Ivey to constitute cheating. The Justices mooted that had a card player merely noticed that some cards had different markings and not told the house, it would not be cheating.[109] Mr Ivey was cheating because he made a positive step to fix the deck, and because he staged 'a carefully planned and executed sting.'[110]

In *Ivey*, the Justices bring the jurisprudence of dishonesty almost full circle. The final third of the judgment is a critique of the test in *Ghosh*, concluding that an objective test for dishonesty should replace the objective, subjective-objective approach that underpinned all tests of dishonesty.

[109] Were the law to be constructed to require the intentional use of an artful device or deception with knowledge that it was deceptive, it could be argued in such a situation as mooted by the Justices that a positive duty could be placed on the accused to not take advantage of such a situation. However, in light of wider doctrines of caveat emptor, not protecting a fool, and a broader liberal tradition within English law, it is unlikely that such a positive duty would be imposed in such a scenario.

[110] Ibid, para [50]

Had the Justices reverted to their eighteenth-century counterpart's approach to deceptive offences and found that dishonesty refers to the actus reus of the act and not the mens rea, they could have avoided the discussion of the correct test for dishonesty all together. Rather, the issue may have been focused upon whether Mr Ivey intentionally deceived the casino, which he did. The trier of fact would not have to ascertain Mr Ivey's state of mind beyond whether he acted intentionally. Whether an act was dishonest or not, or whether a deliberate deception was carried out, would still have to be ascertained by the tribunal of fact and this would have required a decision regarding honest standards of behaviour. This approach would have achieved the same ends desired by the Justices in that no subjective morality of the accused would be considered. As stressed above, the Supreme Court were not in a position to alter the statutory definition of Theft, but engaging in this broader discussion would have acted as a signal to law reformers and Parliament to revisit the role of dishonesty.

Ivey and the delineation between criminal and civil cheats

The Justices in *Ivey* held there to be 'no logical or principled basis for the meaning of dishonesty…to differ according to whether it arises in a civil action or a criminal prosecution.'[111] The Justices again employed selected historical sources, including a seventeenth century statute[112] to support their claim that 'there is no reason to doubt that cheating carried the same meaning when considering an implied term not to cheat'.[113]

This decision is surprising in light of *R v Hinks*. There is a grudging acceptance by commentators that appropriation is construed very broadly following *Hink*s, but that the role

[111] Ibid, para [63]
[112] Gaming Act 1664 16 Cha. 7 alongside the Gaming Act 1710 9 Ann, c. 19 and The *Gaming Act* 1845 (8 & 9 Vict., c. 109)
[113] Above n 3, para [38]

of dishonesty is presumed to act as a safety net to ensure proper criminalisation of theft.[114] However, the Supreme Court cannot have it both ways. It cannot uphold *Hink*s and also align civil and criminal concepts of dishonesty. Appropriation cannot be stretched beyond the civil law, and then the test for cheating reduced to a civil standard. This blurs the lines between a civil and a criminal cheat to the point where the sole difference is the choice of venue. At a time when criminal prosecutions for fraudulent offences are still comparatively few, for reasons of regulatory policy and public ambivalence to fraud, the Supreme Court has made the problematic decision to dismantle the distinctions between cheating at civil and criminal law.

As with the other doctrines of fraud, had the Justices immersed themselves in eighteenth-century jurisprudence surrounding fraud, a clear reason for distinguishing criminal from civil cheats would have become apparent. As demonstrated, the Justices' eighteenth-century predecessors spent decades deliberately disentangling and delineating between cheats at criminal law and what they held to be mere breaches of contract.[115]

Eighteenth century judges recognised the seemingly inextricable relationship between cheating and fraud in civil and criminal law. They clearly stated that this relationship needed to be delineated if any action for fraud, whether civil or criminal, was going to be effectively brought in any court. The criminal cheat was fundamentally distinguished from civil misrepresentations at contract law by the second and third of the doctrines of fraud which I have introduced in this article: 2) that the fraud must have wider public harm, and 3) that this

[114] See discussion above

[115] It is difficult to avoid conflating fraudulent misrepresentation and breach of contract when assessing eighteenth century jurisprudence in this area. Many of the cases cited in this section would be considered misrepresentation cases today, but the reported sections of these cases are preoccupied with breach of warranty rather than misrepresentation.

act was more than a breach of contract. These doctrines can be further understood as requiring harm which goes beyond the individual, and an act which attracts the declaratory and 'standard-bearing' stigma brought by the criminal law.

In his dissenting judgment in *Hinks*, Lord Hobhouse held that it makes no sense to remove understandings of the civil law from the criminal when deciding on property offences, as property is itself a concept derived and understood through the civil law.[116] However, Lord Hobhouse did not go as far as the Supreme Court in *Ivey* that the civil and criminal law needs to be in complete alignment. Property itself is a civil law construct, and so of course some understanding of the civil law is required for all property offences. However, the criminal cheat is forged in centuries of judicial wrangling which vehemently and intentionally separated deception at contract law from the criminal cheat. To unproblematically conflate the two is to ride roughshod over the fundamental underpinnings of cheating.

CONCLUSION

The case of *Ivey* is a timely reminder of the importance of legal historical research for understanding and developing fundamental areas of contemporary law. Having engaged with the historical contextualisation of cheating, the Justices in *Ivey* rightly held that dishonesty has not always formed a part of the mens rea of cheating. Consequently, the *Ghosh* test can be viewed as a relatively recent addition to cheating and that, according to this article, could be removed, without affecting the integrity of this ancient common law offence.[117] In this article I have taken historical research yet further to demonstrate not just that dishonesty is

[116] Above n 10

[117] Cheating as an offence was abolished by S.32 Theft Act 1968 but it is the precursor to a range of modern statutory offences and to the current conception of dishonesty.

not historically a part of the mens rea of cheating, but equally significantly, that dishonesty *has* always been a part of the actus reus of cheating. By introducing a comprehensive framework of the three doctrines of fraud, this article has provided much deeper insight into an offence seldom, if ever, considered by modern criminal lawyers or legal historians. By engaging with the doctrinal underpinnings of cheating, the inseparable relationship between the act of cheating and the presence of dishonesty is revealed.

The introduction of my three doctrines of fraud has also illustrated how past jurisprudence intentionally and conscientiously defined criminal cheating as being something other than a civil breach of contract. The Justices in *Ivey* were keen to conflate a central element of the criminal offence of cheating with tests in civil law without considering how and why precedent so clearly separates the two. Rather than reflect upon the purpose of the criminal law as an institution which goes beyond mere dispute resolution and which apportions moral as well as legal blame, the Supreme Court has mistakenly united cheating under the civil and criminal law.

The Supreme Court seems increasingly keen to use legal history to support judgments. In many ways this is to be welcomed as the use of wider precedent allows for more contextualised and, arguably, better supported judgments. However, *Ivey* is a remarkable example of judicial cherry-picking, Justices selecting precedent from past centuries in a manner which supports a particular conclusion. Throughout the judgment in *Ivey*, the Supreme Court Justices oscillate between relying on historical sources and then dismissing their value. For example, the appellants had relied upon an eighteenth-century definition of cheating with which the Justices initially engaged, but then held there to be 'no occasion to

investigate the accuracy' of this definition.[118] This article has demonstrated that in investigating the definition of cheating over a longer period of jurisprudence, a wider and more accurate definition of cheating emerges, which allows for a more balanced discussion regarding the significance of dishonesty to contemporary criminal and civil law. It can only be hoped that the Supreme Court will engage in more rigorous legal historical research in their future judgments.

[118] Ibid, para [43]