4

Why *Ivey* was a Mistake (aka Two Times I Flirted with Theft)

MARK DSOUZA*

I have learned a tremendous amount about the criminal law from Bob Sullivan's work, and so I am delighted to contribute to this collection of essays to mark his retirement from *Simester and Sullivan's Criminal Law*. Having never studied English criminal law as an undergraduate student, it was the fourth edition of the Simester and Sullivan textbook that became my first and main criminal law teacher when, as a PhD student, I frantically read up on the subject in order to lead undergraduate criminal law supervisions. I do not exaggerate when I say that the Simester and Sullivan textbook has shaped my entire approach to, and understanding of, not just English criminal law, but also key concepts in the theory and philosophy of law. In this chapter, I want to focus on one area of law to which Sullivan has returned time and again, even in his work outside the textbook – the law of theft. In particular, I want to focus on the test for determining whether some conduct has been performed dishonestly.

For decades, the test set out in *R v Ghosh*[1] was used to determine whether a person had behaved dishonestly for the purposes of the criminal law. According to that test, the jury was required to decide the following questions:

1. Was what was done dishonest according to the ordinary standards of reasonable and honest people? And if so,
2. Did the defendant (D) realise that reasonable and honest people would regard what he did as dishonest?[2]

The Court of Appeal illustrated how it thought this this test should apply with the example of the *Visitor on the Bus*: a man who, hailing from a country in which

*I am extremely grateful to Andrew Simester, Bob Sullivan, and Findlay Stark for their detailed comments and suggestions on various drafts of this essay. My thanks also to Ian Williams, Matt Gibson, Flora Page, David Ormerod, John Stanton-Ife, Alex Sarch, and Rory Kelly for their inputs in relation to an early draft.

[1] *R v Ghosh* [1982] QB 1053, 1064.

[2] ibid 1064.

public transport is free, assumes the same is true in England, and does not pay for bus travel. It said of the visitor, 'His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest.'[3] In other words, the Court of Appeal thought that first limb of the test would be satisfied. However, it went on to affirm that the second limb of its test prevented the visitor from being found to have acted dishonestly, on the basis that he would not realise that reasonable and honest people would regard what he did as dishonest.[4]

The Court of Appeal's explanation of the *Visitor on the Bus* example swiftly came in for criticism. Campbell argued that,

> on any reasonable interpretation, [the first limb] would ask: was it dishonest by common standards for the accused to travel on British public transport without paying when he genuinely believed, albeit erroneously, that British public transport is, like that of his own country, free? And the answer to that will surely be 'No.' So this reason given by the court for including limb (2) turns out, on inspection, to be no reason at all. Properly interpreted, limb (1) by itself gives the answer to this example which the court believed could be obtained only by including limb (2).[5]

So, Campbell argued that in applying the first limb of the *Ghosh* test, account should be taken of the visitor's beliefs regarding the norms applicable in society, including, apparently, the legal norms that govern travel on public transport. Presumably, though, the visitor's beliefs as to what constitutes behaving dishonestly would have to be excluded, since that limb of the test refers to the standards of reasonable and honest people, not of D herself. In sum, what I shall call 'Campbell's Gloss' on the *Ghosh* test asks in the first limb of the test, whether the reasonable and honest observer would judge D to have acted dishonestly, taking account of D's knowledge and beliefs about the facts relevant to D's actions. The second limb of the test remains unchanged.

If Campbell is correct that there is no reasonable interpretation of the *Ghosh* test that would treat the *Visitor on the Bus* as satisfying the first, but not the second, limb of the test, then the Court of Appeal erred in its discussion of the *Visitor on the Bus* example, and we have no realistic choice but to reject that part of its judgment. But in the case law, we do find one suggestion about how the Court of Appeal wanted us to understand its test that is consistent with its explanation of the *Visitor on the Bus* example. The Supreme Court has suggested that the Court of Appeal meant for us to consider 'only the [defendant's] actions and not the state of knowledge or belief as to the facts in which they were performed' in the first limb of its test.[6] Let us call this reading of the *Ghosh* test the 'Simplistic View'. If the Simplistic View or any other reading of the *Ghosh* test that is consistent

[3] ibid 1063.
[4] ibid 1064.
[5] K Campbell, 'The Test of Dishonesty in *Ghosh*' (1984) 43 *CLJ* 349, 354.
[6] *Ivey v Genting Casinos* [2017] UKSC 67, [60]. It then went on to say that this was a mistake on the part of the Court of Appeal.

with the Court of Appeal's analysis of the *Visitor on the Bus* example proves to be reasonable, then we do not *need* to reject the Court of Appeal's construction of its own test in favour of Campbell's Gloss. There has been no case in which the court was required to decide between Campbell's Gloss and the Simplistic View (or indeed any other reading of the first limb of the *Ghosh* test), but most commentators have coalesced around Campbell's Gloss.[7]

While the *Ghosh* test was proposed in the context of charges under sections 15(1) and 20(2) of the Theft Act 1968, it came to be applied more broadly, both to other offences in that Act and to offences of dishonesty under other statutes. However, in October 2017, the Supreme Court, in the civil case of *Ivey v Genting Casinos*,[8] decided that the *Ghosh* test was incorrect and resolved authoritatively to state the test for determining dishonesty in both civil and criminal law contexts. According to the *Ivey* test, the jury must ask the following questions:

1. What was D's actual state of knowledge or beliefs as to the facts? And
2. In light of that knowledge or those beliefs, was D's conduct dishonest by the standards of ordinary decent people?[9]

Along the way, the Supreme Court explicitly endorsed Campbell's Gloss as a general principle, stating that, 'in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging'.[10] This suggests that, for the *Ivey* test too, in identifying D's actual state of knowledge or beliefs about the facts, we should be mindful of all of D's beliefs, including beliefs as to the norms governing conduct,[11] but not including beliefs as to what constitutes behaving dishonestly.[12] We should then ask whether ordinary decent people would judge D's chosen conduct to be dishonest in the light of her beliefs about the facts (including facts about norms).

[7] See eg: E Griew, 'Dishonesty: The Objections to Feely and Ghosh' [1985] *Crim LR* 341, 352–53; M Dyson and P Jarvis, 'Poison Ivey or Herbal Leaf Tea?' (2018) 134 *LQR* 198. There is also some oblique support for this view in *R v Hancock* [1990] 2 QB 242, 252–53.

[8] *Ivey* (n 6). The Court of Appeal (Criminal Division) (henceforth 'CA(CD)'), in *Barton and Booth v R* [2020] EWCA Crim 575, has subsequently confirmed that even though it was strictly obiter dicta, the test set out in *Ivey* should also be applied by criminal courts.

[9] *Ivey* (n 6) [74].

[10] ibid [60].

[11] See also the CA(CD) in *Barton* [2020] EWCA Crim 575, which confirmed that for the purposes of the first question in the *Ivey* test, '[a]ll matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard'.

[12] cf D Ormerod and K Laird, 'The Future of Dishonesty – Some Practical Considerations' (2020) 6 *Archbold Review* 8, 9; D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law*, 16th edn (Oxford, Oxford University Press, 2021) 917. Ormerod and Laird suggest that D's belief as to whether others would see her conduct as dishonest is relevant to the first limb of the *Ivey* test, but does not determine the outcome in the second limb of the test. If so, then the test tells us nothing about *when* these beliefs make any difference under the *Ivey* test. Besides, D's belief as to how others would see her conduct is not, strictly speaking, a belief as to what constitutes behaving dishonestly.

The change in the law brought about by *Ivey* has been criticised trenchantly by most, including Fortson,[13] Dyson and Jarvis,[14] Virgo,[15] and Spencer.[16] Sullivan, writing with Simester, recently added his own voice to the chorus of criticism.[17] Sullivan and Simester argue that differentiating between the standards applied in civil and criminal law on the question of dishonesty is, *pace* the Supreme Court in *Ivey*, entirely defensible; and that the *Ghosh* test (which they read in line with the Campbell Gloss) was both preferable on the merits and better suited to complying with the fair notice standards required by Article 7 of the European Convention on Human Rights.[18] To a large extent, I agree. In this piece, I want to offer two further reasons to think that the Supreme Court's ruling in *Ivey* was a step backwards for English criminal law. I propose a slightly different reconstruction of the *Ghosh* test, one that I think coheres better with the words of the Court of Appeal in *Ghosh* and the law relating to offences of dishonesty as it stood when *Ivey* was decided.

The first reason to think that the ruling in *Ivey* was a mistake is that, perhaps surprisingly, there is a respect in which the *Ivey* test over-subjectivises the law of dishonesty, such that offences like theft become, in extreme cases, almost entirely thought crimes. The second reason is that the *Ivey* test is overinclusive. It is not as good as the *Ghosh* test was at capturing the right sort, *and only the right sort*, of culpability. Not only does the *Ghosh* test do better in each of these respects but, I argue, the substantive normative criticisms of the test fail to land. In terms of identifying the sort of culpability that should be captured by a subjective mens rea element such as dishonesty, (a plausible reconstruction of) the *Ghosh* test gets things essentially right.

I. Over-subjectivisation and *Ivey*

My first close encounter with the English law of theft came within days of my first coming to England from India in September 2008. I spent a few days in London before taking up my place at university. Travelling everywhere by tube, I took in both the imposing architecture in central London and the habits of the people. In respect of the latter, I was struck by the contrast between the relative order in things such as riding escalators and boarding and alighting from trains on the one hand, and the blatant and shameless routine theft of newspapers from just outside tube stations on the other. One after another, a stream of well-dressed and

[13] R Fortson, 'Making Dishonesty Fit the Crime' Queen Mary University of London, School of Law Legal Studies Research Paper No 292/2018, https://ssrn.com/abstract=3299369.
[14] Dyson and Jarvis (n 7).
[15] G Virgo, 'Cheating and Dishonesty' (2018) 77 *CLJ* 18.
[16] J Spencer, 'Two Cases on the Law of Theft: A Concertina Movement?' (2018) 8 *Archbold Review* 4.
[17] GR Sullivan and AP Simester, 'Judging Dishonesty' (2020) 136 *LQR* 523.
[18] ibid 525–26.

respectable looking people of all ages, genders, and ethnicities would walk up to an unguarded newspaper stand and, without so much as a quick glance to see if they were being observed, pick up a newspaper and just walk off, without even trying to pay! In those days, I was not a criminal law specialist, and I knew little of the details of English criminal law. I didn't know, for instance, that theft is defined as dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it.[19] But I was certain that I was witnessing widespread criminality. I confess that, seeing the impunity enjoyed by all comers, I was tempted to get in on the act myself. However, since these newspapers were regularly abandoned in the tube, and therefore freely accessible anyway, the temptation did not quite overcome me. It was only months later, on a subsequent visit to London, that I realised that the *Metro* is a free newspaper, distributed at tube stations in open newspaper stands.

But what if, during my first stay in London, I too had grabbed a newspaper from the stand, and hurried into the crowd at Euston station? Would I have committed theft? A newspaper is property. And even if I acquired ownership of it by picking it up, it would, for the purposes of the law of theft, belong to another[20] – the persons whose agents placed it at the station for distribution. I could not have done as I pleased with the newspapers – I could not, for instance, have picked them all up and dumped them in an adjacent rubbish bin. By picking up a newspaper, I would appropriate it, and since I would not be planning to return it to the stand, I would intend permanently to deprive the then owner of it. It would not even matter that the owner of the newspaper consented to my picking up the paper.[21] Everything would turn on whether, in picking up the *Metro*, I was acting dishonestly.

At the time, the *Ghosh* test was the relevant authority on the question of dishonesty.[22] On the Simplistic View of that test, a prosecution against me would fall at the first hurdle. My conduct – picking up a free newspaper in the manner meant for its distribution – would not be dishonest according to the ordinary standards of reasonable and honest people, and so I would not be dishonest irrespective of how I judged my own conduct. Today, however, the *Ivey* test would apply. An investigation of my actual state of knowledge or beliefs as to the facts (including about the norms governing newspaper distribution outside tube stations in London) would show that I genuinely believed that the newspapers were offered for sale, and that one could only take a newspaper if one paid for it. In light of those beliefs, my taking a newspaper without even trying to make payment would surely be dishonest by the standards of ordinary decent people.

I fear that, under the *Ivey* test, I would have been in trouble had I picked up the *Metro* in September 2008 – I would have been guilty of stealing a free newspaper!

[19] Theft Act 1968, s 2.
[20] *R v Hinks* [2001] 2 AC 241.
[21] ibid.
[22] The Theft Act 1968, s 2 does not apply on these facts.

Given that the *Ivey* test was meant to correct the supposed over-subjectivity of the *Ghosh* test, it must surely be a surprise that it enables people, by their subjective beliefs, to convert objectively innocuous events into crimes. Something seems to have gone wrong here.

Perhaps the error is in the way I set up this apparent oddity. You might think that this problem is not unique to the *Ivey* test – in fact, the same result would also follow under the *Ghosh* test if we applied Campbell's Gloss. But recall that Campbell's Gloss was not how the Court of Appeal in *Ghosh* itself thought that its test should operate, and in criticising the *Ghosh* test, the Supreme Court also tacitly suggested that the Court of Appeal's view was how the *Ghosh* test had been understood during the thirty-five years for which it was law.[23]

So, if we read the *Ghosh* test in terms of the Simplistic View, it seems to deliver the intuitively correct outcome in the *Free Newspaper* example, whereas the *Ivey* test seems to deliver an intuitively troubling outcome. But perhaps you disagree with my intuitions. Why shouldn't we bite the bullet and convict in the *Free Newspaper* example?[24] Recall that had I taken the newspaper back in September 2008, I would deliberately have been setting out to do something that I believed was dishonest. There is no doubt that in doing so, I would have demonstrated substantial subjective culpability. In some respects, convicting me would align with the logic of the ruling in *Hinks*,[25] in which, despite D's being taken to have received perfectly good legal title to property from V, she was held to have stolen it because of the dishonesty of her means of appropriating that property. Here too, although I would unknowingly have obtained perfectly good title to the newspaper upon picking it up, you might think that given my dishonesty in picking it up, I deserve to be convicted of theft.

There are, however, a few problems with this line of thinking. The most obvious one is that the decision in *Hinks* is itself far from uncontroversial. Simester and Sullivan have argued that 'theft is concerned directly and primarily with protecting the legal structure of proprietary entitlements',[26] such that 'the harm of theft is the misappropriation of a person's property and the wrong of theft is to take property without claim of right to it and intending to keep or dispose of it'.[27] For them, in treating as criminal receipts of property that are valid in the civil law,

[23] *Ivey* (n 6) [60].

[24] A more drastic alternative is to accept that that if I picked up the newspaper, I would be acting dishonestly, but argue that since by picking up the newspaper, I would obtain full, unimpeachable ownership of it, I cannot be convicted of theft. This would entail rejecting the House of Lords' ruling in *Hinks* [2001] 2 AC 241. I cannot consider that alternative in this chapter, since my aim here is to consider whether it was a mistake for *Ivey* to overturn *Ghosh*, and that matter is best considered against the backdrop of the law (including the ruling in *Hinks)* as it stood when *Ivey* was decided.

[25] *Hinks*, ibid.

[26] AP Simester and GR Sullivan, 'On the Nature and Rationale of Property Offences' in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford, Oxford University Press, 2005) 168, 174.

[27] ibid 179.

the rule in *Hinks* destabilises the foundations of the civil proprietary regime that the criminal law was meant to protect.[28] They add that it is 'undesirable for rule of law reasons that [the] amorphous and vague concept [of dishonesty] should bear [the] very significant weight [of segregating non-criminal from criminal transactions]'.[29]

To the extent that this critique of the rule in *Hinks* is persuasive, it is persuasive also against biting the bullet and supporting a conviction in the *Free Newspaper* example. But not everyone shares the concern expressed by Simester and Sullivan. Bogg and Stanton-Ife have argued that that the ruling in *Hinks* allows the law to protect the vulnerable against exploitation, and that although rule of law considerations could militate against using the law of theft in this way, in fact they do not.[30] Notice, however, that even if we agree with Bogg and Stanton-Ife, we may still validly object to convicting someone of 'stealing' a free newspaper. In *Hinks*, there was at least someone we could plausibly describe as having been victimised – Mr Dolphin was *wronged* by Mrs Hinks' dishonest and exploitative conduct, even though, technically, none of his proprietary interests was harmed. In the *Free Newspaper* example, though, there is no plausible victim in sight. Not only has nobody suffered any harm to their proprietary interests, nobody has been the target of any wrong – exploitation or otherwise – either. On the surface, we have perfectly legitimate and quotidian behaviour. The only thing that would seem to make this behaviour a crime is what was in the mind of the agent.[31] Effectively, and especially given how even mundane conduct can satisfy the actus reus of theft, we would have a thought crime. A person happy to bite *this* bullet is a braver person than I.

II. Overinclusiveness

The second criticism of the *Ivey* test is more tentative. My worry is that the test in *Ivey* is potentially overinclusive (even more so than is suggested by my previous criticism). Furthermore, the *Ghosh* test was arguably better at capturing the right sort, *and only the right sort*, of culpability. To see this, consider briefly the statutory indications about the sort of culpability that the test should be capturing, and how the courts in *Ghosh* and *Ivey* built upon them.

[28] ibid 179–81.

[29] ibid 180.

[30] A Bogg and J Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies* 402.

[31] Elsewhere, I have argued that we should read the conduct element of each offence such that it is not triggered by objectively unremarkable behaviour such as, in this case, picking up a free newspaper from a newsstand. See M Dsouza, 'Beyond Acts and Omissions: Remark-able Criminal Conduct' (2021) 41 *Legal Studies* 1. But as currently understood, '[p]rovided that D does anything whatsoever in connection with property belonging to another person, the actus reus [of theft] is made out'. See AP Simester et al, *Simester and Sullivan's Criminal Law*, 7th edn (Oxford, Hart Publishing, 2019) 559.

For convenience, let us focus on the offence of theft under section 1 of the Theft Act 1968, which identifies culpability in *dishonestly* appropriating property belonging to another with *intention* to permanently deprive the other of the property. In that context, the *Ivey* test focuses on when someone appropriates dishonestly.

The first thing to note is that the Theft Act 1968 gives us no definition of what it is to do something 'dishonestly'. This suggests that Parliament expected ordinary people – society at large – to recognise dishonesty when they saw it. The courts too have consistently expected the same; in *Ghosh* they expected 'reasonable and honest' persons to recognise dishonesty, and in *Ivey* they expected the same of 'ordinary decent' persons.

Instead of a definition, section 2 offers a non-exhaustive list of three instances in which a person does not behave dishonestly, and singles out one factor that is emphatically not sufficient by itself to disprove dishonesty (although neither does its absence establish dishonesty). Each of these provisions refers expressly to D's subjective beliefs (and implicitly, motivations).[32]

But *how* do D's motivations and beliefs matter? This is the nub of the disagreement between the courts in *Ghosh* and *Ivey*. The Court of Appeal in *Ghosh* was clear that D did not get to set, and be judged by reference to, her own standards.[33] A person who professes certain standards but does not live up to them is, amongst other things, a hypocrite. But the various offences that require conduct to have been performed dishonestly in the Theft Act do not also require it to have been performed hypocritically. Instead, the Court of Appeal devised a test according to which D's dishonesty stems from her *knowing* contravention of the standards of honestly of the reasonable and honest person.

It was swiftly pointed out that, since the Court of Appeal had insisted on knowing contravention, a person who was mistaken about the standards of honesty of a reasonable and honest person may well not *knowingly* contravene those standards. In fact, the more deluded D was about the standards of the reasonable and honest person, the more likely she would be to evade conviction. And, critics asked, 'How can that be right?'[34]

[32] Section 2(1) states:

> A person's appropriation of property belonging to another is not dishonest –
>
> (a) if he appropriates the property *in the belief that* he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
> (b) if he appropriates the property *in the belief that* he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
> (c) (except where the property came to him as trustee or personal representative) if he appropriates the property *in the belief that* the person to whom the property belongs cannot be discovered by taking reasonable steps. (emphasis added).

Section 2(2) adds that 'A person's appropriation of property belonging to another may be dishonest notwithstanding that *he is willing to* pay for the property.'

[33] As was suggested by the Court of Appeal in *R v Gilks* [1972] 3 All ER 281, 283.

[34] *Ivey* (n 6) [59]; D Ormerod, DH Williams, *Smith's Law of Theft*, 9th edn (Oxford, Oxford University Press, 2007) para 2.296; Griew (n 7) 353; B Hale, 'Dishonesty' (2019) 48 *Common Law World Review* 5, 11.

Permit me a brief interlude at this point. When this argument is made in classrooms across the country, the question in which it culminates is meant to be a rhetorical one. I am reminded of a friend and classmate on the LLM degree who was a rather quirky character. Amongst his many quirks was a tendency to puncture the sophic silence that followed rhetorical questions asked by professors in the Cambridge Law Faculty's cavernous lecture theatres (the one I recall was, 'If someone cleaned your windscreen at a traffic light and then demanded a pound for their service, would you feel obliged to pay?') by loudly volunteering an answer all the way from his seat in the very last row ('Yes!'). This prompted much mirth from the gathered masses … but after we settled down, those who took my friend's answer seriously ended up reflecting much more deeply on the issue at hand than even the somewhat nonplussed professor at the lectern had hoped. In much the same vein, Sullivan and Simester recently took seriously the question with which I ended the previous paragraph, and argued that, 'if D is genuinely unaware that others would disapprove of D's conduct, it becomes less clear that society should condemn D with the full force of the criminal law'.[35] The Court of Appeal in *Ghosh* hinted that we could go even further. It recognised that, in borderline cases, if the jury thought that 'the defendant may have believed what he was doing was in accordance with the ordinary man's idea of honesty … [it may have to conclude] that the defendant … was *disobedient or impudent, but not dishonest* in what he did'.[36] Accordingly, it should not convict D of an offence requiring dishonesty.

There is something in these suggestions – and I propose to explore that presently. But for now I note that, unfortunately, not enough people took it upon themselves to answer the rhetorical question I identified previously. So, relatively unquestioned, over the years the concern implicit in that question worked its way up to the Supreme Court in *Ivey*. It was this concern, principally,[37] that motivated the Supreme Court's rejection of the *Ghosh* test.

The Court in *Ivey* took a very different approach to D's state of mind in the test for dishonesty. It built as much as possible of what D knew and believed into the background of D's conduct, and required D's conduct to be judged objectively by reference to this background. Thus, if D deludedly believed that payment was not expected in the *Visitor on the Bus* example, then D's conduct travelling without payment would not be judged objectively dishonest in light of that belief. But if D deludedly believed that it is not dishonest to fail to pay for bus travel even where payment is required, then D would be judged objectively to be dishonest, despite his own contrary belief. Moreover, some parts of the Supreme Court's judgment seem to suggest that a belief *must genuinely be held* if it is to be relevant to the test. For instance, immediately after stating that 'the fact-finding tribunal must first

[35] Sullivan and Simester (n 17) 526.
[36] *Ghosh* [1982] QB 1053, 1064 (emphasis added.).
[37] *Ivey* (n 6) [58]; Hale (n 34) 11.

ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts', the Supreme Court explains that the 'reasonableness or otherwise of his belief is a matter of evidence … 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*'.[38]

If this is true, then the *Ivey* test is overinclusive. Under it, consideration of D's motivations drops out entirely; the *Ivey* test treats falling short of the objective standards of dishonesty applicable to a person with D's knowledge and beliefs as being, by definition, dishonest. In a sense, it is true that the *conduct* is dishonest. But, as I will illustrate presently, it is not necessarily true that the agent performs the conduct *for dishonest reasons*, such that it becomes appropriate to say that she conducted herself dishonest*ly*. That is, our adverse judgement of the conduct does not necessarily translate into an adverse judgement – of the sort we can make when subjective fault is present – of D.

Another way of making this point is to compare the source of culpability in the *Ghosh* and *Ivey* tests. The second limb of the *Ghosh* test identifies the source of D's culpability: D's culpability stems from a volitional act, ie her *choice* to conduct herself in a manner that she (correctly) believed would be seen as dishonest by reasonable and honest people. This choice reveals something about the D's values. It reveals, prima facie, that she is the sort of person who wilfully disregards the social conventions of dishonesty – D seems content to be seen as dishonest. And so, prima facie, she is.[39] But another person who chose to perform the very same conduct and did not, for whatever reason,[40] believe that it would be seen as dishonest by reasonable and honest people would not be dishonest, since her choice would not reveal that she is the sort of person who wilfully disregards the social conventions of dishonesty. The *Ghosh* test therefore identifies D's culpability in what her *choice* of conduct reveals about her.

Assuming that only genuinely held beliefs and knowledge are relevant to the *Ivey* test, culpability under that test flows from D's (absent) cognitive state, ie the absence of any knowledge of or belief in propositions that, if true, would prevent her conduct (given that it was performed in light of those propositions) from being objectively dishonest. Nothing would turn on her reasons for choosing to perform her conduct. But notice that here D's cognitive state by itself says nothing especially damning about D's standards of honesty. The main thing the test

[38] *Ivey* (n 6) [74] (emphasis added).

[39] For more detail on how D's choices can allow us to draw valid conclusions about D's personal blameworthiness, see AP Simester, *Fundamentals of Criminal Law* (Oxford, Oxford University Press, 2021) 244–45; M Dsouza, 'Criminal Culpability After the Act' (2015) 26 *King's Law Journal* 440, 444, 449–50.

[40] See eg *R v Hayes* [2015] EWCA Crim 1944, [15], [28] and [33], where the CA(CD) was open to the possibility of a jury's finding that D was dishonest because he did not realise that reasonable and honest people would regard his conduct as dishonest, even if his reasons for so thinking included that D believed his actions to be in line with acceptable industry practices in the specialised field of LIBOR trading.

seems to reveal is whether, given the knowledge and beliefs that D had, the *conduct* that D chose to perform deserves the label 'dishonest'. The same conduct, performed by anyone with the same set of beliefs and knowledge, would always be judged the same way, irrespective of why a particular agent chose to perform the conduct. And although it will sometimes be true that the agent who performed such conduct was motivated by a disregard for social conventions of honesty, this is not inevitable.

Let me illustrate this point with my second close encounter with the English law of theft. In August 2018, well after *Ivey* was decided, I moved to Highgate in London. Near my house was a small take-away that, I discovered, did excellent piri-piri chicken. One day, feeling too lazy to cook, I placed an order over the phone and walked over to collect it. I got there a few minutes before my order was ready, and spent that time chatting with the proprietor. He told me that he was from Pakistan, and I reminisced with him about the one time I had visited his country, telling him how much I loved the food there, and how welcome I had been made to feel. As he handed me my order, the proprietor said he looked forward to seeing me again and, smiling, I promised that he would. Neither of us realised how soon. It was only 45 seconds later that I heard him calling down the street to me. It transpired that, caught up in our friendly chit-chat, neither of us realised that I had not paid.

What if I had been charged with theft?[41] The chicken I had taken was property and, at the relevant time, it belonged to the proprietor. I had undoubtedly appropriated it, and I had every intention of permanently depriving the proprietor of that very chicken. But had I acted dishonestly? None of the exceptions in section 2 of the Theft Act 1968 applied to me, and so the question falls to be decided by reference to the *Ivey* test. I certainly knew that I was meant to pay for the food. I also knew that I had the food as I walked out of the establishment. I did not subjectively believe that I had paid – in truth, the payment stage of our transaction had simply slipped my mind. In fact, if by 'beliefs' we mean dispositional beliefs (as surely we must – if only occurrent beliefs could exculpate, the *Ivey* test would be wildly overinclusive), then one might even say that I believed that I had not paid; no doubt, had I been asked, I would have confirmed that proposition, as indeed I did when the proprietor called out to me.[42] So if my conduct – walking

[41] Absent-minded defendants have been charged with theft before: *R v Clarke* (1972) 56 Cr App R 225, usually considered in the context of the insanity defence, was actually a case in which D was charged with shoplifting. D had put some supermarket grocery items into her carrier bag rather than the supermarket's wire basket, and walked out without paying for them. She later explained that she had recently been feeling depressed and overwhelmed, and had been acting absent-mindedly. She claimed to have no recollection of having picked up the concerned items, some of which were items that she never consumed. Perhaps in that case, given D's absent-mindedness, in addition to the dishonesty issue, there is some doubt about whether D had the intention to permanently deprive the supermarket of the concerned items. No such complications arose in my case.

[42] See F Stark, *Culpable Carelessness* (Cambridge, Cambridge University Press, 2007) 94–111 for an extended explanation of the dispositional account of what it is to believe a proposition, and an explanation of why this account is apt for criminal law purposes.

away with the chicken – stood to be judged objectively in light of the beliefs that I confess I held, I would seemingly be found to have acted dishonestly according to the test in *Ivey*.

Perhaps one might dispute this conclusion on the basis that the *Ivey* test's reference to 'D's actual *state of* knowledge or beliefs as to the facts'[43] somehow means that I am exculpated by fact that I had *no occurrent* belief that I had not paid. For this to be true, it would have to be the case under the *Ivey* test, first, that my not having an occurrent belief that I had not paid is *ex*culpating, and second, that my dispositional belief that I had not paid is not *in*culpating (or at least, that if it is inculpating, its effect is trumped by the exculpation supplied by my having no occurrent belief as to the same proposition). But it is far from obvious that these claims are plausible. Nothing in the Supreme Court's judgment suggests anything quite so complicated. In fact, parts of the judgment seem to indicate that, in the Court's view, a belief has to be held 'subjectively' and 'genuinely' if it is to be relevant to the test. This suggests that the *absence* of an occurrent belief, inculpating or otherwise, is not relevant. Neither is it clear that such an absence should be relevant, let alone have such a decisive effect, on the determination of D's actual state of knowledge or beliefs as to the facts. Why should someone who would willingly affirm the truth of a proposition if asked be found not to believe the proposition simply because she happened not, at the time of acting, to call that proposition to mind? Furthermore, treating the absence of an occurrent inculpating belief as exculpating would run contrary to the criminal law's approach in relation to the closely allied notion of awareness. In that context, the courts have unambiguously treated the dispositional awareness of a risk to be sufficiently inculpating, notwithstanding the absence of an occurrent awareness of the risk.[44] There seems little, either doctrinally or normatively, to commend adopting the opposite approach in the context of beliefs in dishonesty.

At the least, if it is indeed the position that the absence of occurrent inculpating beliefs is relevant to, and overrides even the presence of, dispositional inculpating beliefs when determining D's actual state of knowledge or beliefs as to the facts, a judicial clarification to this effect would be welcome. Until then, there is at least the suspicion that the *Ivey* test is so overinclusive that it cannot distinguish people who display a wilful disregard for the social conventions of dishonesty from absent-minded (associate) professors.

[43] *Ivey* (n 6) [74].

[44] See *R v Parker* [1977] 1 WLR 600. D argued that so frustrated was he with how his evening had been going that 'It did not occur to [him] that [slamming the handset of a phone down onto the cradle] might damage [the phone].' In other words, he denied occurrent knowledge of the risk of damaging the phone by his actions. However, the court ruled that the relevant knowledge could be attributed to D given that he 'was plainly fully aware of all the circumstances of the case. He was fully aware that what he was handling was a telephone handset made of Bakelite or some such material. He was well aware that the cradle on to which he admittedly brought down the handset was made of similar material. He was well aware, of course, of the degree of force which he was using.' In other words, it allowed dispositional awareness to trump occurrent unawareness.

Moreover, even if such a clarification were forthcoming, the *Ivey* test would still be overinclusive. To see this, recall that while the *Ivey* test is generally sensitive to D's beliefs about the (general) normative standards applicable in society, D's beliefs specifically about what society would consider to be dishonest behaviour do not determine whether she behaved dishonestly. For this test, the concept of 'behaving dishonestly' is objective, in the sense that it is weakly mind-independent:[45] the fact of what constitutes dishonest behaviour transcends the beliefs or attitudes of any given individual (and, in particular, D), and derives instead from the beliefs and attitudes shared by individuals who interact as a group (for our purposes, the set of ordinary decent people in our society).

Now consider cases in which D behaves in a manner that is considered dishonest in this weakly mind-independent sense because she is genuinely unaware that others would judge her conduct to be dishonest. Perhaps in some such cases, the reason that D is unaware that others would judge her conduct to be dishonest is that she is so dishonest that she is also morally warped. There could be no serious objection to assigning the morally condemnatory label 'dishonest' to D in such cases. The problem is that a lack of awareness of societal moral standards may also be explicable by reference to factors that do not suggest that D is a dishonest person. For instance, some people on the autism spectrum find it especially difficult to pick up and correctly interpret social cues, and may therefore form incorrect beliefs about whether ordinary decent people would consider certain types of conduct dishonest.[46] Imagine someone with an undiagnosed autism spectrum disorder watching *Oliver!* together with a trusted companion, and missing the sarcasm in the latter's declaration of Fagan as a paragon of virtue. This person may genuinely come to believe that 'You've got to pick a pocket or two' – or at least that it is appropriate to take something you really want from someone who is much better off. But this mistake about societal standards is not attributable to any factor that justifies our labelling her dishonest. It is not just that 'if D is genuinely unaware that others would disapprove of D's conduct, it [is] less clear that society should condemn D with the full force of the criminal law';[47] in fact, it is not

[45] MH Kramer, *Objectivity and the Rule of Law* (Cambridge, Cambridge University Press, 2007) 3–4 and MH Kramer, 'Is Law's Conventionality Consistent with Law's Objectivity?' (2008) 14 *Res Publica* 241, 242–43.

[46] In *Barton* [2020] EWCA Crim 575, the CA(CD) held that:

> All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused.

But the relationship between intelligence and being on the autism spectrum are complicated; the CA(CD)'s reference to considering the accused's intelligence does not obviously apply to autistic defendants. Moreover, courts have refused to subjectivise *other* objective tests by considering the defendant's autism spectrum disorder (see *R v B(MA)* [2013] EWCA Crim 3); it is far from certain that they would do so for the *Ivey* test. Neither is being on the autism spectrum per se enough to trigger an insanity defence. If a defendant on the autism spectrum is unable to point to their disorder to deny mens rea, she will usually have no defensive plea available at all.

[47] Sullivan and Simester (n 17) 526.

clear that D has *any* of the sort of culpability needed to establish that she has even prima facie committed an offence involving dishonesty.[48]

In short, the *Ivey* test makes an unsubstantiated logical leap in treating a lack of awareness about societal standards of dishonesty as conclusive proof that D is a dishonest person. Even if making this logical leap would not lead to persons being unfairly labelled 'dishonest' in most cases (and to the best of my knowledge, there is no empirical basis for thinking that this is the case), it will do so in some cases. And being on the autism spectrum is just one example of an explanation for being unaware of societal standards of dishonesty that does not suggest that the unaware person deserves to be called dishonest; there may well be others. In treating what is, at best, a moderately good proxy for dishonesty as being constitutive of dishonesty, the *Ivey* test is overinclusive.

III. Why *Ghosh* Does Better

It is all well and good criticising the *Ivey* test, but given that statute does not define the term 'dishonestly', we need something with which to replace it. There are two broad possibilities – either we return to (some version of) the *Ghosh* test, or we come up with something new. My own view is that we do not need to devise a new test. This is not just because, as has been pointed out by others,[49] the Supreme Court's doctrinal criticisms of the *Ghosh* test were largely unfounded or not of a magnitude that called for its being jettisoned. I think that on its own merits, the *Ghosh* test, or at least a plausible reconstruction of it, actually does a very good job of identifying the sort of culpability that we want to target with the requirement of dishonesty in performing certain conduct. What's more, on close inspection, the various substantive objections that commentators have, over the years, made to the *Ghosh* test fail to land. Consider first, this latter claim.

[48] In fact, in *Hayes* [2015] EWCA Crim 1944, which was a case involving an offence of dishonesty, D was, during his trial, diagnosed with an autism spectrum disorder. However, the medical evidence in that case was that D's condition was mild and was therefore 'unlikely to have affected his ability to determine if an action was potentially illegal or fraudulent, unless this was communicated by subtle social means' [104]–[105]. Therefore, the CA(CD) was satisfied that in that case, there was nothing objectionable about the finding that D acted dishonestly [107]. *Hayes* was decided before the *Ivey* test replaced the *Ghosh* test, and the CA(CD)'s apparent openness in principle to the proposition that D's autism spectrum disorder might influence the finding on dishonesty must be read in that light. But one can easily imagine a case involving a more severe autism spectrum disorder, and/or more subtle communications about the potential dishonesty of some course of conduct, in which D's ability to determine if an action was dishonest was significantly compromised. Under the *Ivey* test, which is unconcerned with *why* D's conduct fell short of the standards of honesty of ordinary decent people, such a person would inevitably be deemed to have acted dishonestly.

[49] See eg: Sullivan and Simester (n 17); Fortson (n 13); Dyson and Jarvis (n 7); Virgo (n 15); D Ormerod and K Laird, '*Ivey v Genting Casinos* – Much Ado About Nothing?' (2017–18) 9 *UK Supreme Court Yearbook* 380, 388–91; and Spencer (n 16).

Substantive Normative Criticisms of the *Ghosh* Test

The most comprehensive and sustained critique of the *Ghosh* test was made by Griew;[50] most subsequent critiques of the test essentially restate the points that he made.[51] Therefore, I focus here on Griew's criticisms and, more specifically, on those of his criticisms that addressed the *Ghosh* test on substantive normative grounds.

Griew took it that Campbell's Gloss provided the correct reading of the *Ghosh* test[52] and focused his criticisms on that reading of the test, although most of his arguments can apply equally to the Simplistic View. He divided up his criticisms based on which limb of the *Ghosh* test they addressed. His substantive normative criticisms of the first limb of the *Ghosh* test – the requirement that the jury decide whether what was done was dishonest according to the ordinary standards of reasonable and honest people – are all connected. With some paraphrasing, they are that:

(a) the notion that there are community norms of dishonesty is a fiction,[53]
(b) the test lets the standard for dishonesty be set by jurors, whereas these should be dictated by the law,[54] and
(c) the test licenses jurors to reach verdicts that, though inconsistent, are not technically perverse.[55]

It is worth noting that insofar as the *Ivey* test requires essentially the same thing as Campbell's Gloss on the first limb of the *Ghosh* test – the jury must decide by reference to what would be seen as 'dishonest by the standards of ordinary decent people' – these criticisms could equally be made of the *Ivey* test. I think they would be equally unconvincing in that context too.

Consider Griew's first objection. That there isn't perfect unanimity in any given legal community about what constitutes dishonesty is hardly surprising. There will always be some outliers. But if that is Griew's objection, it is extremely weak. The criminal law has never needed unanimity in order to refer sensibly to a community standard; all it requires is adequate consensus. Reliance on community norms established by adequate consensus is ubiquitous in the criminal law. We find it in the test for whether an omission satisfies the conduct element of an offence,[56] the

[50] Griew (n 7).
[51] See eg: *Fraud and Deception* (Law Com Consultation Paper No 155) paras 5.11–5.20; *Simester and Sullivan's Criminal Law* (n 31) 584–85; *Smith, Hogan, & Ormerod* (n 12) 912–14.
[52] Griew (n 7) 352–53.
[53] ibid 344, 345.
[54] ibid 346, 347.
[55] ibid 346, 346–47.
[56] It does so when the omission was in breach of a duty to act, and a duty to act typically requires the duty holder to take only *reasonable* steps. See eg: *R v Miller* [1983] 2 AC 161; *R v Evans* [2009] EWCA Crim 650. Therefore, it is always necessary to determine whether a defendant's omission amounted to a failure to take reasonable steps. This determination depends on the existence of some community norm as to what steps were reasonable to take in a given context.

definition of recklessness,[57] the mens rea standard for serious sexual offences,[58] the test for gross negligence manslaughter,[59] and in most any other place we care to look for it.

If the claim is that there is something especially obscure about dishonesty that means there is inadequate consensus on this specific norm, then that claim needs to be supported with empirical evidence. Griew supplies none.

When the Law Commission considered the same issue, it too, without empirical evidence, agreed that there was especial uncertainty as to the norms of dishonesty. One reason it cited was that while, traditionally, fact-finders are required to evaluate D's conduct by reference to objectively defined legal standards, dishonesty is a *moral* standard.[60] It is not clear why the characterisation of a standard as 'moral' or otherwise matters. From a practical perspective, all we should care about is whether a given standard (be it moral or otherwise) provides enough guidance to the fact-finder. And, as previously mentioned, there was no evidence to suggest that the standard of dishonestly does not. Besides, it is not clear that the various standards other than dishonesty to which the criminal law refers routinely and uncontroversially are not also moral standards. For instance, the criminal law regularly asks fact-finders to evaluate the reasonableness of conduct and beliefs. It seems to me that the standard underlying such evaluations is a moral one. Surely, 'How much should we care about the interests of those affected by our conduct or beliefs?' is a moral question. And yet, this does not make the test of reasonableness too obscure or difficult to apply in the criminal context. Why should dishonesty be any different?

The Law Commission suggested another reason to think that norms of dishonesty are too uncertain to establish a suitable criminal law standard. Contrasting the evaluation required in the *Ghosh* test with the one that fact-finders make when deciding whether negligence resulting in death was gross enough to merit a conviction for gross negligence manslaughter, it argued that the latter

[57] *R v G and R* [2004] 1 AC 1034. The test asks whether it was reasonable to take a foreseen risk, and the jury decides this by asking what a hypothetical reasonable person would do. This is essentially a proxy for referring to community norms of reasonableness relating to particular instances of risk-taking.

[58] The mens rea in each of the offences in ss 1–4 of the Sexual Offences Act 2003 includes the absence of a reasonable belief as to consent. The determination of whether a belief as to consent was reasonable relies on there being some community norm as to what beliefs about consent are reasonable to form in a given set of circumstances.

[59] Determinations of the level of risk high enough to amount to a *serious* and *obvious* risk of death (see *R v Misra* [2004] EWCA 2375; *R v Rudling* [2016] EWCA Crim 741) depend on there being normative consensus on these matters within the relevant community or subcommunity of persons that might be expected to respond to such risks. Likewise, to determine whether a defendant's negligence was bad enough to amount to *gross* negligence, we must ask whether the negligence was so bad as to merit a criminal conviction. See *R v Adomako* [1995] 1 AC 171. This test depends upon there being adequate community consensus as to when negligence is so bad as to merit a criminal conviction.

[60] Law Com No 155 (n 51) 5.11.

evaluation 'is more objective, because the riskiness of a person's conduct is more quantifiable than its dishonesty [which] … is not quantifiable, even in theory'.[61] With respect, even granting the debatable claim that the riskiness of conduct is easier to quantify than its dishonesty, nothing in that claim supports the Law Commission's conclusion that there is inadequate consensus on dishonesty to use it as a criminal law standard. First, nothing in the key cases setting out the grossness element of the test for gross negligence manslaughter[62] says that the jury must determine whether the risk of death crosses some numerical threshold. And if a numerical quantification of risk is not required, then the supposed ease with which the degree of risk could, had it been necessary, have been quantified seems unconnected with whether the community standard to which the test for grossness refers is fit for purpose. Second, even if the quantity of risk is a relevant consideration when evaluating the grossness of negligence, nothing in the *Ghosh* test requires the jury to quantify the degree of D's dishonesty. The jury need only decide a binary question: 'Did D behave dishonestly: yes or no?' The supposed comparative difficulty in quantifying dishonesty does not imply that there is insufficient consensus on dishonesty for it to offer adequate guidance on this binary question. In all respects that matter, it seems that the Law Commission was actually correct in its initial hypothesis, namely that the *Ghosh* test was 'no different in principle'[63] from the test for grossness in gross negligence manslaughter.

Griew's second criticism can be divided into two subclaims: first, that the jury must set the standards for dishonesty; second, that the standard in the *Ghosh* test is not dictated by law. The first subclaim assumes that asking the jury to decide whether something was dishonest according to the ordinary standards of reasonable and honest people is the same as asking it to decide whether something was dishonest according to the jurors' own standards. Despite the fact that it is regularly made,[64] this claim is simply false. The *Ghosh* test does not authorise the jury to set the standard for what amounts to dishonesty by reference to its own (shared) beliefs and attitudes, any more than it authorises D to do so. Instead, the jury is required to tap into a standard that exists independently of any given jury – one that refers to the beliefs and attitudes shared by society as a whole. And while it is true that (much like D) the twelve people in any given jury room may have their own individual or shared esoteric conception of

[61] ibid 5.13. The Law Commission added that a '30% risk of death is greater than a 10% risk'. But there is nothing extraordinary about making similar comparative assessments of levels of dishonesty ('Boris is even more dishonest than Dominic'), and the fact that we do not assign numerical values when doing so need not necessarily undermine the confidence with which we can make such claims.

[62] *R v Adomako* [1995] 1 AC 171; *R v Misra* [2004] EWCA 2375.

[63] Law Com No 155 (n 51) 5.13.

[64] See eg ibid 5.11, 5.13; JR Spencer, 'Dishonesty: What the jury Thinks the Defendant Thought the Jury Would Have Thought' (1982) 41 *CLJ* 222, 224; Ormerod and Laird (n 49) 382, 397; *Smith, Hogan, & Ormerod* (n 12) 911.

what amounts to dishonesty, if they applied that esoteric conception of dishonesty in their appraisal of D's conduct, they would not be applying the *Ghosh* test correctly.[65]

Now consider Griew's second subclaim, namely that the standard in the *Ghosh* test is not dictated by law. The Law Commission found this objection persuasive: it considered that, unlike the standards applicable in the offences of careless driving and dangerous driving, the standard for dishonesty under *Ghosh* was not legally defined and was left to the jury to decide.[66] I have already addressed the latter proposition, but consider now the former. According to the Law Commission, when fact-finders are required to determine whether some instance of driving was bad enough to make it careless or dangerous, they refer to standards that are legally defined. The standard of what constitutes dangerous driving is set out in statute, and the standard of what constitutes careless driving was, at the time, defined in case law.[67] But the statutory test for dangerousness in driving to which the Law Commission referred[68] is replete with terms that call for reference to community standards: a person's driving is dangerous when it 'falls far below what would be expected of a competent and careful driver', and when 'it would be obvious to a competent and careful driver that driving in that way would be dangerous'. The same is true of the common law tests for carelessness in driving, which the Law Commission identified as coming from *Taylor v Rogers*[69] and *Scott v Warren*.[70] The test in *Taylor v Rogers* asks whether 'the defendant [was] exercising *that degree of care and attention which a reasonable and prudent driver would exercise in the circumstances*'.[71] The test in *Scott v Warren* asks whether D 'acted with the alertness, skill and judgment *reasonably to be expected in the circumstances of any emergency which disclosed itself*'.[72] It appears, then, that by the Law Commission's lights, standards are considered legally defined when statute and case law refer to community standards. By that yardstick, the standard applicable under the *Ghosh* test too is legally defined.

Griew's third criticism of the first limb of the Ghosh test fares no better. True, different juries may reach different conclusions regarding whether the same conduct performed with the same state of mind is dishonest. But since this can happen with respect to *any* evaluative element that different juries are asked to decide, it is only an especial problem if, as Griew suggests, none of the conflicting

[65] Notice that exactly the same is true also of the test for 'grossness' in gross negligence manslaughter. The jury is required to apply a standard of grossness that refers to beliefs and attitudes shared by society as a whole; a standard that exists independently of any given jury.

[66] Law Com No 155 (n 51) 5.12.

[67] Although now see Road Traffic Act 1988, s 3ZA, which was inserted by the Road Safety Act 2006, s 30.

[68] Road Traffic Act 1988, s 2A.

[69] *Taylor v Rogers* (1960) 124 JP 217.

[70] *Scott v Warren* [1974] RTR 104.

[71] *Taylor* (n 69) 218 (emphasis added).

[72] *Scott* (n 70) 107 (emphasis added).

juries acts perversely.[73] Griew's thought seems to be that each jury can legitimately choose to identify different community norms relating to the honesty of D's conduct, and can therefore reach different verdicts on exactly the same facts without acting perversely. But insofar as the community norms of dishonesty exist independently of any given jury's determination of what those norms are, it is not true that each jury can *legitimately* choose to identify different community norms relating to the honesty of D's conduct. A jury that chose to identify norms that it knew to be different from the community norms of dishonesty would indeed be acting perversely.[74]

Now consider Griew's substantive normative criticisms of the second limb of the *Ghosh* test – the requirement that D have realised that reasonable and honest people would regard what she did as dishonest. Griew argues that exonerating D based on her mistaken beliefs as to the societal standards of honesty is akin to allowing her to raise a mistake of law defence.[75] Furthermore, he says, doing so would lead to the 'remarkable' result that the more ignorant and deluded D was as to the standards of the reasonable and honest person, the more likely she would be to escape a conviction.[76]

Griew is right that, in a sense, the *Ghosh* test lets D raise something like a mistake of law defence. But of course, section 2 of the Theft Act 1968 is exceptional in precisely that respect – section 2(1)(a) expressly says that a person's appropriation of property belonging to another should not be regarded as dishonest if she appropriates it *in the belief that she has a legal right to deprive the other of it*. It expressly allows a mistake of law-based response to an accusation of dishonesty. If anything, the *Ghosh* test is in keeping with the statutory scheme for dishonesty. And as to Griew's second point, I have already argued that it makes perfect sense to say that when D chooses to conduct herself in a manner that she (correctly) believes would be seen as dishonest by reasonable and honest people, she reveals herself to be dishonest. Conversely, when she makes no such choice, she does not reveal herself to be dishonest.

Culpability under the *Ghosh* Test

So Griew's criticisms of the *Ghosh* test fail to convince. But before we rush to endorse the *Ghosh* test, we need to settle the controversy about whether the first

[73] Griew (n 7) 346. See also DW Elliott, 'Law and Fact in Theft Act Cases' [1976] *Crim LR* 707, 711; DW Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] *Crim LR* 395, 408–09; Law Com No 155 (n 51) 5.18.

[74] There is a separate concern about whether local community norms may differ across the jurisdiction, but this is not a concern especially for the norms of dishonesty – it may arise in respect of any reference to a community standard.

[75] Griew (n 7) 353.

[76] ibid.

limb of that test is best read in line with the Simplistic View, or Campbell's Gloss, or in some other way.

Recall that the first limb of the *Ghosh* test required the jury to decide whether 'what was done' was dishonest according to the ordinary standards of reasonable and honest people. Unfortunately, the Court of Appeal in *Ghosh* did not specify how rich a conception of 'what was done' we should adopt. Confusion over this issue founds much of the criticism of the test. On the Simplistic View, which the Supreme Court in *Ivey* attributed[77] to the Court of Appeal in *Ghosh*, we could read that phrase to refer to what the reasonable and honest observer, with no special insight into D's mind, would judge D to have done based solely on appearances. However, the Supreme Court ultimately agreed with Campbell[78] that under 'the (objective) first leg of the *Ghosh* test … in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging'.[79] In other words, it believed that we should adopt a much richer reading of what was done – a reading that is sensitive to D's own understanding of what was being done within the context of the rules that D believed governed his activity.

Although these readings of 'what was done' reach the same finding on the issue of dishonesty in the *Visitor on the Bus* example, they do so by different routes. Unlike Campbell's Gloss, the Simplistic View does not need to insist that the Court of Appeal erred in its discussion of the Visitor on the Bus example. This is one reason to prefer the Simplistic View over Campbell's Gloss. Furthermore, while Campbell's Gloss would support a finding of dishonesty (leading to a conviction for theft) in the *Free Newspaper* example, the Simplistic View would not. I take it that this is a desirable outcome, and for this reason too, we should prefer the Simplistic View to Campbell's Gloss. But before we embrace it, we need to address one worry about the Simplistic View. There is one respect in which the Simplistic View seems to be underspecified. To see this, consider the following example:

> *Casual Carjacker:* Aruna is seen casually accepting car keys from a valet, and driving off with a car. Unknown to the observer (and the valet), Aruna does not own the car; she is a carjacker with chutzpah.

When setting out the Simplistic View, the Supreme Court in *Ivey* did not specify whether the observer judging the defendant's actions has access to the objective situational facts about the deed done. If the observer does not, then she would not know, for instance, who owned the car. Therefore, given how confidently Aruna picks up the keys and drives away, the observer, considering only Aruna's actions and not her state of knowledge or belief as to the facts when

[77] *Ivey* (n 6) [60].
[78] Campbell (n 5) 353. See also Griew (n 7) 352–53; Dyson and Jarvis (n 7) 202.
[79] *Ivey* (n 6) [60].

performing them, would have no reason to think that what was done in *Casual Carjacker* was dishonest. The first limb of the test would therefore rule out a finding of dishonesty, despite the fact that on any sensible understanding of *Casual Carjacker*, Aruna is dishonest. This is clearly not what was contemplated in *Ghosh*. What's more, in requiring D's conduct to be judged based solely on appearances, this reading of the Simplistic View would throw open the door for the jury to make snap judgements based on all sorts of preconceptions about what sorts of people and behaviours are 'dodgy'. In sum, this reading of the Simplistic View is so obviously flawed that it is not a realistic option – we can discard it without further ado.

So the better reconstruction of the Simplistic View is that the observer does have access to, and can take account of, the objective situational facts about the deed done. On this reconstruction, the phrase 'what was done' in the first limb of the *Ghosh* test refers to what the reasonable and honest observer would judge D to have done, taking account of all objective situational facts about the deed done, but not any matters that reside solely in D's subjectivity (such as D's beliefs, plans, or motivations). Call this the 'Proposed Reconstruction'. The Proposed Reconstruction is consistent with how the *Ghosh* test has been understood and applied by some courts.[80] To see how adopting it affects the analysis, consider also the following additional examples:

> *Bicycle Version 1:* Ayesha is seen cutting the lock on a bicycle by a reasonable and honest observer who has no special awareness of Ayesha's mental state. The bicycle belongs to Ayesha, but she has lost her keys.
> *Bicycle Version 2:* Same facts as above, but this time Ayesha (wrongly) believes the bicycle belongs to her and, puzzled that her key has stopped working, has decided to cut the lock.

The reasonable and honest observer described here would characterise what D did by taking account of all relevant objective situational facts, but not the agents' beliefs, intentions, or motivations. Accordingly, she would characterise what was done by considering, in both versions of the *Bicycle* example, who actually owned the bicycle. Similarly, in *Casual Carjacker*, she would consider who owned the car; and in *Free Newspaper*, that the newspaper was distributed free of charge. On this basis, she would conclude in *Bicycle Version 1* and in *Free Newspaper* that what was done was not dishonest, and that the first limb of the *Ghosh* test was not satisfied. Although in principle, the second limb of the test would apply differently to these two agents, we would never get to the point of applying it. She would also conclude that what was done *was* objectively dishonest in *Bicycle Version 2* and *Casual Carjacker*. But, in *Bicycle Version 2*, Ayesha would not realise that the reasonable and honest observer would regard what

[80] See *General Medical Council v Krishnan* [2017] EWHC 2892 (Admin) [25]; *Hayes* [2015] EWCA Crim 1944, [18] and [20] read with [33].

she did as dishonest, not least because, given that she believed that the bicycle belonged to her, Ayesha would have a different characterisation of the deed done than that of the reasonable and honest observer. Accordingly, the second limb of the *Ghosh* test would preclude a finding of dishonesty in that case. It would not, however, similarly protect Aruna, who would realise that reasonable and honest persons, knowing that the car was not hers, would regard her impersonating the owner and taking the car as dishonest conduct. The Proposed Reconstruction then, supports a finding of dishonesty in *Casual Carjacker*, but not in either version of *Bicycle*. I take these to be desirable liability outcomes, and indeed they are the same liability outcomes that both the *Ivey* test and Campbell's Gloss would generate. Additionally, and unlike either the *Ivey* test or Campbell's Gloss, the Proposed Reconstruction accommodates the analysis of the Court of Appeal in *Ghosh* in relation to *Visitor on the Bus* example, and blocks a finding of dishonesty (leading to a conviction for theft) in the *Free Newspaper* example. For these reasons, we should prefer the Proposed Reconstruction to Campbell's Gloss.

One cannot be certain whether the Proposed Reconstruction was the Court of Appeal's intended reading of the *Ghosh* test, but it is the most charitable of the compatible interpretations canvassed. This, coupled with its greater precision in identifying subjective culpability, means that this reading of the *Ghosh* test is clearly a better test for dishonesty than the *Ivey* test. In fact, given its pedigree and familiarity in the English criminal law, there is no reason to look beyond it for a test for dishonesty in criminal law.

IV. Conclusion

The Supreme Court's decision in *Ivey* to cast aside the *Ghosh* test took many criminal lawyers and commentators by surprise, not least because it did so in a civil case, away from the watchful eye of criminal lawyers. The unorthodox circumstances in which a well-established rule in the criminal law came to be discarded may have contributed to the generally negative reaction to *Ivey*. But set aside for the moment the criticisms relating to how the change was made, whether it was really needed, and whether the Supreme Court's critiques of the *Ghosh* test were compelling.[81] As a practical matter, not everyone was convinced that the change in the law was especially significant. Indeed, some suggested that, actually, 'the Supreme Court's judgment may have less practical impact for the vast majority of cases than might be imagined'.[82] One might even have thought that, in normative terms, there is little to choose between *Ghosh* and *Ivey*.

[81] These are set out in great detail in Fortson (n 13). See also Sullivan and Simester (n 17), Dyson and Jarvis (n 7), Virgo (n 15), and Spencer (n 16).

[82] K Laird, 'Dishonesty: *Ivey v Genting Casinos UK Ltd*' [2018] *Crim LR* 395, 396.

I have argued here that, actually, the move from *Ghosh* to *Ivey* was normatively significant and that it was unfortunate. The *Ivey* test supports convictions in respect of perfectly quotidian behaviour that neither harms nor wrongs anybody, based purely on D's (false) belief in matters, in light of which her chosen conduct would be dishonest. Effectively, on certain facts, it turns offences of dishonesty into thought crimes. Moreover, even where D holds no false beliefs, the *Ivey* test is overinclusive. It assumes that persons who conduct themselves in a manner that is objectively dishonest in light of their knowledge and beliefs are dishonest. While unobjectionable at first glance, this standard also arguably treats people who were merely absent-minded as having been dishonest. Moreover, it deems 'dishonest' people who have mistaken beliefs about the societal standards of dishonesty for reasons that do not undermine their personal integrity. The *Ghosh* test, as reconstructed here, is superior in comparison to the *Ivey* test in each of these respects. Moreover, in terms of identifying the sort of subjective culpability that we would expect from a subjective criminal law mens rea element, the *Ghosh* test arguably gets it essentially right. There is every reason to reconsider the *Ivey* test insofar as it applies to the criminal law. If and when that happens, I have argued that the best course of action would be to revert to the *Ghosh* test, as reconstructed here.