The UK Supreme Court Yearbook · Volume 9 pp. 290–311

Part II: The Cutting Edge of Dishonesty – *Ivey v Genting Casinos* symposium

ORDINARY DECENT HONESTY

Professor John Gardner FBA[*]

1 Standards of character

English criminal law often invokes standards of character. A defendant who pleads the defence of duress invites the assessment of her actions according to a standard of fortitude or courage. When the defence of provocation (now rebranded 'loss of control') is run, the defendant's actions are judged by a standard of self-restraint or self-control. Offences of negligence, such as gross negligence manslaughter, are committed only by those whose actions fall short relative to a standard of caution or prudence. Most pertinent to the concerns of this chapter, which reacts to the recent decision of the UK Supreme Court ('the Court') in *Ivey v Genting Casinos (UK) Ltd* ('*Ivey*'),[1] many property offences (including theft and fraud) are defined by law such that a defendant's actions are held up to a standard of honesty.

In all of these contexts, as my formulations are designed to bring out, the law's ultimate interest is in the defendant's actions. Her criminal offending lies, not in what she was disposed to do or would characteristically have done, but in what she actually did. The relevant standards of character are applied to what she did adverbially, i.e. they are used to judge the way in which she did it. With duress, provocation, and negligence, the adverbial application of the relevant standards of character is *in*direct. The law asks whether (perhaps fortuitously) the defendant acted as a suitably courageous, self-controlled or prudent person would have acted, not whether she herself exhibited courage, self-control, or prudence. It is irrelevant, in other words, whether she did what she did for the right reasons or in the right spirit. In this respect the property offences are different. The question, with theft and fraud, does not stop at whether the defendant did what a suitably honest

[*] Senior Research Fellow, All Souls College, Oxford; Professor of Law and Philosophy, University of Oxford.

[1] [2017] UKSC 67, [2018] AC 391.

 DOI: 10.19152/ukscy.765

person would have done. Rather, the honesty standard is applied to her directly. Did she herself fall below the relevant standard of honesty in doing what she did? As the law expresses the standard, did she act *dis*honestly? In answering this question, the reasons for which and the spirit in which the defendant acted are potentially relevant. I say 'potentially' to leave open the possibility that there is a class of actions that are, as it were, dishonest *per se*, irrespective of the defendant's mentality. I leave the possibility open, but it is doubtful whether any actions fall into this class. Stealing and defrauding are analytically dishonest, but that is only because they are defined in terms of dishonesty.[2] It is not because, were the element of dishonesty omitted from their definitions, they would analytically be dishonest just in virtue of their *other* defining ingredients. The word 'dishonestly' in their definitions is not redundant.[3] It invites us to pay attention to various features of what the defendant did beyond those that are covered by the other ingredients of the offence. And it invites us to attend, in particular, to the reasons for which, and the spirit in which, the defendant acted.

Sometimes one and the same deed might qualify as either honest or dishonest, depending only on the reason why it was done. Eagerly sell the shares to profit one's investor clients and one is honest; eagerly do the same to profit oneself and one is dishonest. In some such cases, in settling whether one was honest or dishonest, it is a salient question whether one was attempting to follow certain rules, for example the rules of a profession or the rules of a game. True, one might not actually end up conforming to those rules. An honest person might well make a mistake such that she does not do what she had in mind to do. What is relevant to her honesty in such a case is that she acted with conformity to the rules in mind. This already shows one role that the word 'dishonestly' might play in the definition of some criminal offences. It might be designed to exclude from the offender class those who are attentive to the rules of what they are doing, but whose attempts at conformity with those rules misfire. They may still be careless, imprudent, impetuous, etc. in the misfire; but at least they are not dishonest. 'The rules' here must mean some rules other than the very rule, breach of which constitutes the criminal offence involving dishonesty. It is not enough to avoid committing an offence that one was trying to avoid committing it. It is also not enough to make one honest that one was trying to be honest. Nevertheless, sometimes, it is enough to make one honest

[2] Theft Act 1968, s 1; Fraud Act 2006, ss 1-4.

[3] Compare *Ivey* (n 1) [49] (Lord Hughes): 'Some might say that all cheating is by definition dishonest. In that event, the addition of a legal element of dishonesty would add nothing.' This is misleading. That all theft is by definition dishonest explains why 'dishonestly' appears in its legal definition in the Theft Act 1968, s 1. *Given that definition*, it would 'add nothing' to say that all theft is by definition dishonest. But that is not the same, obviously, as saying that 'dishonestly' is redundant *in* the definition.

that one was trying to work or play within some further rules. We may then say that one broke the rules honestly as opposed to dishonestly. One made, as the criminal law itself sometimes puts it, an honest mistake. In that case, although perhaps one still committed a tort or an actionable breach of contract or breach of fiduciary duty, it is perhaps not one suitable to be criminalized. Be that as it may, it is not one suitable to be criminalized as a crime of dishonesty.

These remarks may lead one to hope that, by thinking about which rules the honest person is attentive to, one could work out what the honest person would characteristically end up doing. This hope, although misplaced, is not *entirely* misplaced. When the law invokes standards of character, one of its objectives in doing so is to get us to reflect on how people might end up acting, or not acting, if only they were suitably attentive or inattentive to certain features of the world around them. This objective makes sense because each virtue of character is none other than a desirable kind of attentiveness or inattentiveness, distinguished from other virtues of character by the features of the world that it is a kind of attentiveness or inattentiveness to.[4] In the relevant sense of the word, attentiveness has cognitive, affective, and motivational aspects. People with different virtues of character notice different facts, feel differently about them, and are moved by them differently in how they respond. We might say that they care more about some things than others, and what makes theirs the caring of a virtuous person is that what they care about is indeed worth caring about it in just the way in which and to just the extent to which they care about it. With some virtues, we should substitute 'don't care' for 'care'. The courageous person cares less about dangers and hazards to herself, the patient person cares less about the slowness of progress, the tolerant person cares less about other people's limitations, etc.

Those are examples of virtues of inattentiveness, of setting admirably less store by particular features of the world. Here are some examples of virtues of attentiveness. Considerate people care more about how others might be hurt, upset, or put out by what they do. Loyal people care more about their special ties to others, and about the others to whom they have those special ties. Fair-minded people care more about the allocative aspects of what they do. Who, they wonder, will get how much of what? Diligent people care more about the performance of their duties and hence about what will help with that performance. And honest people care more about ... what, exactly?

[4] The picture of virtue that I invoke here is similar to that sketched in John McDowell, 'Virtue and Reason' (1979) 62 The Monist 331. Fundamentally it is a cognitive picture. The affective and motivational aspects of each virtue are determined by the cognitive aspect. If one doesn't feel it right, or one isn't moved right by it, then one simply doesn't see it right.

That is surprisingly hard to say. Minimally, they care more about keeping things in the open, above board, free of artifice. It is tempting to add a reference to trust.[5] At the same time it is tricky to include such a reference without mutating honesty into trustworthiness. And that is to be avoided: too little attentiveness to one's promises and undertakings makes one untrustworthy, but it does not make one dishonest unless one also conceals it, e.g. by making promises or undertakings that, as part of secret stratagem, one does not intend to keep. In such a case, does the fact that one made a promise that one never intended to keep make one dishonest, or does one's dishonesty reside only in the secrecy of the stratagem? Suppose that, as soon as one promises, one adds in all seriousness: 'I won't be keeping that promise; my promises aren't worth much, as you know.' That casts a shadow over one's trustworthiness. But surely not over one's honesty? Isn't one being impressively honest? In these and various other ways the difference between dishonesty and untrustworthiness is easier to detect in concrete cases than it is to state satisfyingly in the abstract. Perhaps that is all that Lord Hughes has in mind when he says, speaking for the whole Court in *Ivey*, that 'like the elephant, [dishonesty] is characterised more by recognition when encountered than by definition.'[6]

Yet probably Lord Hughes also has another point in mind, one that bears particularly on the place of standards of character in the law. Not all the features of the world to which virtuous people attend are ordered into rules, or even capable in principle of being ordered into rules. So the law cannot 'define' honesty or dishonesty in the sense of providing a list of rules that one must attend to, never mind conform to, if one is to stay honest or avoid being dishonest.[7] One's virtues of character lie partly in one's competence in negotiating the unruly circumstances in which, as a human being, one daily finds oneself, including the unruly circumstances that bear on whether one should be following rules at all. The person who tries to act and live by rules alone is not virtuous. He is not just, or diligent, or honest, or scrupulous, or conscientious. He is a jobsworth, a stickler, a rule-fetishist, a martinet. He is probably a bit of a prat.

That acting and living well cannot be reduced to following rules is the point that Aristotle has in mind when he says that:

> all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but

[5] For an attempt to do so, see James D Wallace, *Virtues and Vices* (1st edn, Cornell University Press 1978) 107-09.

[6] *Ivey* (n 1) [48].

[7] McDowell (n 4) 336-7.

> not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.[8]

Aristotle finds hope in 'the equitable' – that is 'a correction of law, where it is deficient on account of its universality.'[9] Equity licenses courts and other adjudicators to depart from the applicable legal rule. But departure from an applicable legal rule is not the only way to avoid errors of the kind that Aristotle describes. An alternative device, no less favoured in the English legal tradition, is to embed *within* the legal rule a subsidiary standard that cannot be reduced to any rule or rules. The legal rule then invites the rule-applier to fall back on 'considerations which ordinarily [bear on] the conduct of human affairs'[10] quite apart from the legal rule that is being applied, and thereby to mitigate (what would otherwise be) the unacceptable over- or under-inclusiveness of that rule when it is being applied beyond the 'usual' case.

This is where standards of character typically play their part in the criminal law. They are standards left largely in their natural unruly form, inviting the rule-applier to make a raw moral judgment about the defendant's action, or at least some aspects of the defendant's action, in the course of applying a legal rule. In other writing I have described such a standard as a 'legally deregulated zone' that operates inside the law.[11] That formulation is useful in bringing out an important implication of what I have been saying. 'Dishonesty,' as Lord Hughes nicely puts it in *Ivey*, 'is not a matter of law, but a jury question of fact and standards.'[12] Thus, 'whether [the defendant's] conduct was honest or dishonest is to be determined by the fact-finder,'[13] largely using the fact-finder's own understanding of what counts as dishonesty and why. To replace that understanding with an understanding prescribed by law, and hence explained in the judge's direction to the jury, would be to defeat the main object of including dishonesty as an ingredient of the offence in the first place. The main point is to mitigate the endemic problem with rules, and thus with law itself, that was noted by Aristotle.

---

8 Aristotle, *Nicomachean Ethics* (ed and tr by R Crisp, CUP 2004) 99–100 (1137^b 12-19).

9 ibid 100 (1137^b 26-27).

10 *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784 (Alderson B), part of his seminal formulation of the 'reasonable person' standard in negligence.

11 John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563,572.

12 *Ivey* (n 1) [48].

13 ibid [74].

2 Which standard of honesty?

Twice in the preceding paragraph I qualified my claims with the word 'largely'. Why? Not just to accommodate the fact that, by statute, certain specific beliefs on the part of a defendant are deemed to be incompatible with dishonesty for the purpose of trying a theft charge.[14] Also to accommodate the fact that there is, in spite of everything, a standard direction that is legally required to be given by the judge to the jury (or by magistrates directing themselves) on how to think about dishonesty, and which unavoidably implicates some kind of legal rule on the subject. Until the decision of the Court in *Ivey*, the required jury direction was known as 'the *Ghosh* direction' after the case of *R v Ghosh*, in which it was first formulated.[15]

The Court in *Ivey* disapproves part of the *Ghosh* direction. That disapproval is the main thing that makes the *Ivey* case an important one for the development of the law. We will return to the disapproved part of the *Ghosh* direction ('the second leg') in sections 3-5. No less interesting, in my view, is the part of the *Ghosh* direction that *Ivey* preserves ('the first leg'). Lord Hughes formulates the first leg in two subtly different ways:

> [The] rule [is] that, once the defendant's state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or magistrates.[16]
>
> When once [the defendant's] 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.[17]

You might think that these formulations state a vestigial legal rule on the subject of the dishonesty standard only in this trivial sense: they state the legal rule that there is no (further) legal rule. But it is not entirely clear that this is all that is going on. Lord Hughes says, in both formulations, that the standards of honesty and dishonesty to be applied by the fact-finder are the standards of *ordinary* people. What exactly does he mean? Does he mean:

[14] Theft Act 1968, s 2(1).
[15] [1982] QB 1053.
[16] *Ivey* (n 1) [57].
[17] ibid [74].

> (a) that the fact-finder is not to imagine that there are specialised legal standards of honesty? In that case the word 'ordinary' admittedly adds nothing except confirmation that there is no (further) legal rule to be applied regarding dishonesty.

Or does Lord Hughes mean something like:

> (b) that, to avoid being classified as dishonest, the defendant need not be perfectly honest, superbly honest, even especially honest, but only honest to some lesser, more ordinary, extent?

If he means something like (b) then contrary to interpretation (a) there is at least one (further) legal rule on the subject of dishonesty, namely the rule that not every shortfall of honesty is to be classed, for legal purposes, as dishonesty.

That interpretation (b) is the correct one is strongly suggested by the fact that, in each of Lord Hughes' formulations, the ordinary person is not the ordinary person simpliciter. She is the ordinary *honest* person (first formulation) or the ordinary *decent* person (second formulation). If the ordinary person is merely the generic layperson, the nonlawyer, of interpretation (a), then these additional qualities of character ascribed to her seem beside the point. That additional qualities of character are ascribed to her suggests that it matters, in the eyes of the law, what measure of attentiveness she is taken to have. The ordinary person is not just any old ordinary person but an *ordinarily honest* or *ordinarily decent* person, and it is in view of that aspect of her own character that she serves as the appropriate standard-setter for the character of the defendant. Presumably the tacit assumption is that she will set the same standard for the defendant as she would set for herself, viz. something falling short of utter perfection in honesty. For she herself may not be perfectly honest but it does not follow – does it? – that she is positively dishonest. There is logical space between perfect honesty and its inversion.

One may doubt whether the tacit assumption is true. An honest person may not be the best judge of honesty. Honesty may go along with a certain naivety. The logical space, on the other hand, is certainly there. Mere want of honesty is not dishonesty. Aristotle places two cases in the middle ground between virtue and vice: the case of the *akratic*, the person who appreciates like her virtuous counterpart what would be the right thing to do, and is moved to do it, but gives in to a temptation to do the opposite, and the case of the *enkratic*, the person who is moved to do the wrong thing like her vicious counterpart, but constrains herself by force

of will to do the opposite.[18] Where do *akrasia* and *enkrasia* fit into the everyday assessment of dishonesty? *Enkratic* people, although clearly not honest, are also not dishonest. Why? Because it is a necessary condition of being dishonest that one acts dishonestly, i.e. that one's leanings towards dishonesty are exhibited in action. By force of will one can avoid the realization of one's dishonest potential, and thereby avoid being dishonest. Lord Hughes' second formulation captures this: 'the question [is] whether his *conduct* was honest or dishonest.'[19] His first formulation, however, muddies the waters: the question is whether 'the [defendant's] *state of mind* was dishonest or not.'[20] An *enkratic* person may have a dishonest state of mind. But he does not act dishonestly and should be acquitted even if all other ingredients of theft, fraud, etc. happen to be present. (Think of someone who manages her urge to shoplift by furtively buying tat that she does not need. She appropriates property belonging to another with the intention of permanently depriving, and she does so in a dishonest state of mind, but she does not do it dishonestly. True, she may act dishonestly later when she conceals all the tat from her family, but by then the property no longer belongs to another, hence no theft.)

Akratic people, however, are in a more difficult position. I am not sure that someone accused of dishonesty offers a very promising defence if she says: 'I wasn't exactly dishonest. I was just weak. I gave in to an overwhelming urge to shoplift.' That she gave in to an overwhelming urge might help her to show that she isn't *habitually* dishonest, but does it help her to show that she wasn't dishonest on this particular occasion?

The answer seems to depend on an evaluation of the temptation to which she was subjected. With some temptations – the temptation to pocket a five pound note spotted lying in the gutter, for example, or the temptation to sneak into the pay toilet without paying when the turnstile is broken – we might be prepared to say that only a person of exceptional honesty would have done differently. But in that case it is not the *akrasia* of the one who surrenders to temptation that is providing her defence against the charge of dishonesty. Quite the reverse: it is the fact that she is not very *akratic* at all. She would not have pocketed a fifty pound note, or a piece of precious jewellery, although the temptation might well have been much greater. She would not have smuggled herself onto a train or into a cinema, even if that could have been pulled off just as easily and with more money saved. If she had given into these larger temptations, exhibiting greater *akrasia*, we

[18] '*Akrasia*' is usually translated as 'weakness of will' and '*enkrasia*' as 'strength of will' but these translations may mislead for reasons explained in Richard Holton, *Willing, Wanting, Waiting* (1st edn, OUP 2009) 83-6.

[19] *Ivey* (n 1) [74].

[20] ibid [57].

would be more likely to class her as dishonest. Five pounds, by contrast, is hardly worth the trouble of a futile visit to the police, who would only laugh, while 30 pence, when the kids need the loo, is certainly not worth the trouble of trying to find out who to pay when the turnstile is broken. The person who sees things this way is ordinary in respect of her honesty. She is not a paragon but a person of ordinary virtue, and hence ordinary limitation. Her main defence to a charge of dishonesty is that a limitation is not the same as a vice.

The very fact that people have their different virtues means that they also have their different limitations. That I am notably loyal may leave me with problems on the fair-mindedness front; I just can't rise above my special relationships to the point of being the best referee, or even the best adviser, when my friends are in conflict with *their* friends. As a diligent person, meanwhile, I may be less tolerant or patient than I would ideally like to be; people who take a more relaxed attitude to their duties than I do may just drive me crazy. Why don't they care about arriving for their appointment on time, returning their books to the library, washing up after themselves? And as a kind person I may find myself being less than impeccably honest; when someone asks me whether I like their new haircut or their new boyfriend or their new jacket, I may well dissemble a little to avoid upsetting them. I may even try to feign some enthusiasm.

The last example is surely very familiar within friendship groups. At any rate, within mine. Among my friends there are some who are more honest at the price of being less kind, and some who are kinder at the price of being less honest. As the need arises, I turn to some to learn the unvarnished truth ('that wasn't your finest hour') and others to calm me down with tea and sympathy ('you're being too hard on yourself'). Does it follow that all my friends have their vices, that some (the really honest ones) are cruel and others (the really kind ones) are dishonest? Far from it. Even my kind friends are pretty honest, and even my honest friends are pretty kind. The differences between them arise only at the margins, in cases in which the considerations to which they are respectively most attentive clash irreconcilably. Much moral philosophy in the modern age has taken the line that there can be one and only one justified action in such cases of irreconcilable conflict. Of a kind friend and an honest friend, who respond to the same situation differently, only one can be justified in what she does, and she is the one who exhibits the one true virtue of which all others are approximations or subsidiaries. For the utilitarians the one true virtue is a kind of benevolence.[21] For Kant it is diligence.[22] But a more

[21] Nicely explained in William Frankena, 'Beneficence/Benevolence' (1987) 4 Social Philosophy and Policy 1.

[22] Discussed in Barbara Herman, *The Practice of Moral Judgment* (1st edn, Harvard University

classical view is that the possessors of different virtues, with competing priorities, need not be ranked and need not have their virtues folded into a single master-virtue.[23] They care about incommensurably different things, and across a range of cases each may be justified even though each reacts differently.

Does it follow that each is virtuous only inasmuch as she is justified in what she does? No. There is also room for excused virtuous action. By their nature as forms of attentiveness or inattentiveness our virtues of character may lead us somewhat astray. We may be led to set too little store by important features of our situations in setting admirably heightened store by others. The question is only how far our heightened attentiveness might lead us astray before we stop being virtuous and are drawn into vice, also known (now more often known) as fault. One natural reading of Lord Hughes' formulations is that this is the question that, in connection with dishonesty, the fact-finder is supposed to ask. She is supposed to ask herself whether any want of honesty exhibited by the defendant was within the excusable range, i.e. within the range that might be explained by other admirable qualities that she possesses, or at any rate be explained consistently with such qualities. The defendant, we may suppose, took no trouble to track down the owner of the five pound note that she found in the gutter. Maybe that would have been a bit too fussy, too fastidious, perhaps honesty taken to a fault. Still, maybe an impeccably honest person would have given it to charity rather than quietly pocketing it? Maybe, but was it inexcusable, hence positively dishonest, for her to apply a 'finders keepers' principle to a mere five pounds? It would certainly be dishonest to pocket a fifty. So where, between five pounds and fifty pounds, would one draw the line? Different people, all more or less honest, would draw the line in different places. There is some latitude for error built into the very idea of a virtue of character, and one might well think that this is the same latitude for error that Lord Hughes wants to build in when he invites the fact-finder to insist only on *ordinary* honesty.

The example with the five pounds in the gutter draws one's attention, however, to a serious risk in Lord Hughes' use of the word 'ordinary'. Faced with this word, one can imagine a juror torn between two rival lines of thought. One is that pocketing five pounds dropped in the gutter is within the bounds of the excusable, and hence within the bounds of the acceptably honest, whereas pocketing fifty is not. The other is that many people today

Press 1993), ch 1.

[23] Calling this view 'classical' is slightly tendentious. The ancients held complex, diverse and sometimes puzzling views about the relations among the virtues. For an exploration sympathetic to my 'classical' view, see Susan Wolf, 'Moral Psychology and the Unity of the Virtues' (2007) 20 Ratio 145.

would pocket the fifty anyway, and laugh openly at anyone honest enough to try and reunite it with the its owner by handing it in to the police. 'What a mug!' they might say. Even the police might say it to each other in private, even though they dutifully register the money in the official file of items handed in. The prevailing social standard of honesty might, in other words, have broken loose from the true moral standard. Or at any rate the juror might conclude that it has. In that case, is Lord Hughes' talk of 'ordinary honesty' to be taken to be directing the juror to the prevailing social standard rather than the true moral standard?

That is certainly one way of understanding the expression. Understood like this, some people who are seriously dishonest are nevertheless to be treated as 'ordinarily honest', because such dishonesty is the best one can expect in the way of honesty these days in these parts. This still leaves us within what I called interpretation (b) of Lord Hughes' words. We are still supposing that, to avoid being classified as dishonest, the defendant need not be perfectly honest, superbly honest, even especially honest, but only honest to some lesser, more ordinary, extent. All we are doing is adjusting, some might say debasing, the relevant measure of ordinariness. The juror might well say to himself: if everyone round here would call me a mug for handing in the fifty pounds, I couldn't be regarded as very ordinary in my honesty were I to hand it in. So if I were to decide that the defendant's pocketing of the fifty was dishonest, I wouldn't be 'representing' the 'standards of the ordinary honest person' as Lord Hughes would have me do. Ordinary people (round here, these days, like me ...) just aren't as honest as all that. In fact they are mainly a bunch of rogues and chancers, and good luck to them.

Maybe it is in anticipation of this line of thought that Lord Hughes, in his second formulation, redescribes the ordinary honest person as the ordinary *decent* person? Maybe he is here struggling to find a way of conveying to the fact-finder that for the law's purposes the ordinary honest person isn't the person who is as honest as most people are these days – because it may turn out that most people these days are not very honest. The ordinary honest person, he wants to make clear, must also pass a further test. She must be decent as well. So, more fully spelled out, the imaginary character we are interested in becomes the ordinarily *decently* honest person. Alas, this reformulation returns us to much the same problem of the moral standard and the social standard coming apart. What if most people these days just aren't particularly decent? They are mostly out for themselves. Then being ordinarily decent, meaning only as decent as most people are, isn't going to be much of a virtue. It is still going to be consistent with pocketing the fifty pounds.

It is not clear how to avoid this problem. One could add to the direction:

'Members of the jury, in determining what counts as ordinary decent honesty, apply what you regard as the correct standards, not what you regard as the prevailing ones round here these days.' But there is a risk here of neutralizing the important word 'ordinary' in an attempt to clarify it, i.e. of nudging the jury back towards the standard of a paragon. And perhaps more importantly there is a risk of weighing down what was supposed to be a jury question with a lot more law. For now there is – the jury will inevitably conclude – a legally approved standard of 'ordinariness'. For all it is supposed to be reconciled with their own standards ('what *you regard* as the correct standards') it must also to some extent constrain or circumscribe their reliance on their own standards. Otherwise why give an extra direction distinguishing the correct standard from the prevailing one?

3 The law and the jury

Judges concerned with the directing of juries need to cope with at least two feedback loops, both illustrated in the foregoing remarks. One is that, by trying precisely to draw the line between questions of law and questions of fact, the judge already moves that line. For inevitably he or she adds more law, viz. the law that governs the drawing of the line. The other has to do with the fact that jurors may well not be optimal implementers of the law as explained to them in the direction. They are lay people performing an occasional duty. What the judge says and what jurors take from what the judge says may well diverge. The judge who is skilled in jury direction anticipates, and attempts to minimize, the divergence. The problem is that whatever the judge says to help the jury to understand and apply the law must also *be* the law. The judge cannot say: 'I tell the jury that the law is P but the law is actually -P. It turns out that telling people to apply P is the best way to get them to apply -P.' That way of approaching jury direction violates the openness (dare I say 'honesty'?) requirement of the rule of law.[24] To conform to the openness requirement, whatever the jury are told is the law must also be the law. So the law, inasmuch as it regulates matters that often go before juries, inevitably gravitates towards whatever judges regard it as optimal to direct juries that the law is, where the optimality in question is an optimality relative to whatever the law would have been had there been no need to direct juries on it. Call this the 'jury optimization problem'.

The jury optimization problem is a problem for the decision of the Court in *Ivey*. The appeal to the Court in *Ivey* arose from breach of contract litigation, not from a criminal prosecution. It was not a case that would ever have been tried by a jury. Questions about the dishonesty standard in the criminal law

[24] On which, see John Gardner, *Law as a Leap of Faith* (1st edn, OUP 2012), ch 8.

arose in a roundabout and somewhat artificial way. It was agreed to be an implied term of the parties' contract, a gambling contract, that the parties to it would not cheat. If the plaintiff cheated, he wouldn't be able to enforce the term as to payment of his winnings. So the question arose of what counts in law as cheating. The Court, like the courts below, was persuaded that 'cheat' was to be given the same meaning in the contract as it would be given in the criminal law,[25] where cheating was once a common law offence[26] and now figures in at least one statutory offence.[27] Must cheating in the criminal law be dishonest? Lord Hughes, giving the unanimous judgment of the Court, said 'not necessarily'. However, in an extended *obiter* discussion, he considered the law's approach to dishonesty anyway. Not only must 'cheat' be given the same meaning throughout the law, he said; so too must 'dishonest'.[28] This immediately put the *Ghosh* direction under scrutiny. As already noted, the direction was in the end part-approved and part-disapproved by the Court. More on the part-disapproval in a moment. Before that, notice that the *Ghosh* direction, which is a direction to a jury, was put under scrutiny in a case in which there was no question of how best to direct a jury. Accordingly, Lord Hughes did not confront the jury optimization problem. Indeed he denied its existence:

> [T]here can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution.[29]

'There can be no logical or principled basis' is a strong claim. It goes well beyond 'it would be a bad idea on balance'. It amounts to a denial that the need to direct a lay jury in a criminal trial counts as any reason for the criminal law to be different. Denying this, Lord Hughes implicitly absolves himself from the need to offer any kind of reason in favour of harmonizing the criminal law with the civil law. He does not need a reason for them to be the same, he thinks, because, in his view, there is no reason for them to be different. That strikes me as an error on several levels. But even if it is not an error, it does not show that the best way to direct a jury must depend wholly on the (independently ascertained) law, rather than the law being expected to adjust, at least somewhat, to the best way to direct a jury.

[25] *Ivey* (n 1) [38] (Lord Hughes).
[26] It remains so only in the context of 'cheating the public revenue', a fragment of the common law preserved by the Theft Act 1968, s 32(1).
[27] Gambling Act 2005, s 42.
[28] *Ivey* (n1) [63].
[29] ibid.

4 The defendant's awareness of the standard

Be that as it may, Lord Hughes saw 'a number of [other] serious problems about the second leg' of the *Ghosh* direction.[30] In the second leg of the *Ghosh* direction, the jury is instructed to consider whether the defendant was at the time aware[31] that he was acting dishonestly by the standards of the ordinary honest person specified in the first leg. If he was not so aware, then he is not to be regarded as dishonest in law.[32]

Lord Hughes worries about giving people the legal benefit of their mistakes about the applicable standards. Doesn't doing so in the present context have the 'unintended effect' that 'the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour'?[33] That is the first objection on Lord Hughes' list. This 'leniency' objection, as I will call it, does not strike me as decisive. But before we come to it – and in order to come to it – let's consider the second objection on Lord Hughes' list, which I will call the 'redundancy' objection.[34] The second leg in *Ghosh*, he says, was added on the basis 'that it was necessary in order to give proper effect to the principle that dishonesty [...] must depend on the actual state of mind of the defendant.'[35] But the second leg, Lord Hughes objects, 'is not necessary to preserve this principle.'[36]

To see why, he invites us to revisit a hypothetical devised by the Court of Appeal in *Ghosh*, one that was indeed specifically designed to show the need for the second leg:

> Take for example a man [call him R] who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest.[37]

Lord Hughes thinks that this hypothetical fails to support the addition of the second leg to the *Ghosh* direction. That is because R, in his view, is

[30] ibid [57].
[31] In *Ghosh* itself the words used by Lord Lane CJ were 'must have realised' and 'knew': *Ghosh* (n 15) 1064.
[32] ibid.
[33] *Ivey* (n 1) [57].
[34] It echoes an objection first raised under that name by Kenneth Campbell: Kenneth Campbell, 'The Test of Dishonesty in *R v Ghosh*' (1984) 43 CLJ 349.
[35] *Ivey* (n 1) [57].
[36] ibid.
[37] *Ghosh* (n 15) 1063 (Lord Lane CJ), quoted in *Ivey* (n 1) [60] (Lord Hughes).

already amply protected by the first leg. 'Because he genuinely believes that public transport is free,' says Lord Hughes, 'there is nothing objectively dishonest about his not paying on the bus.'[38] That is because '[w]hat is objectively judged [in the first leg] is the standard of behaviour, *given any known actual state of mind of the actor as to the facts.*'[39] R makes a mistake of fact about 'how public transport works'[40] that already acquits him of any dishonesty by the standards of an ordinary honest person, for an ordinary honest person already makes allowances for such mistakes of fact in deciding who is dishonest.

Compare another hypothetical offered by Lord Hughes: if S misreads the validity times on her bus pass, and thus presents it for use at a time of day when it is not valid, she may be careless or forgetful or even foolhardy, but she is not dishonest.[41] To acknowledge this we surely do not need to lower the applicable standard of honesty in the way envisaged by the second leg of the *Ghosh* direction. Indeed, there is nothing to be gained for S in lowering the applicable standard of honesty in that way. For there is no suggestion at all that S is unaware of that applicable standard of honesty. All she is unaware of, so far as we know, is the information printed on her bus pass. And the same is true *mutatis mutandis*, argues Lord Hughes, in the original *Ghosh* hypothetical.[42] All that R is unaware of, so far as we know, is that a fare is charged for bus journeys in these parts. A jury, persuaded that R really was unaware of this, might think him naive or incurious or blasé,[43] but would surely not think him dishonest. And that means not dishonest by *any* standard of honesty, be it lower or higher. Dishonesty is the wrong accusation.

We may agree with Lord Hughes' conclusion here while doubting his analysis. The two hypotheticals, those of R and S, are similar but not perfectly alike in the relevant respect. S makes a vanilla mistake of fact. She misreads or misremembers a number on a piece of paper, knowing full well the rule by which that number determines her right to travel without further payment. R, by contrast, makes a mistake about the applicable standard. True, his mistake is not best described as being about the standard *of* honesty that is upheld in these parts, but it is about some standards *bearing on* honesty that are upheld in these parts, in particular the standard that says 'you must pay a fare to travel on the bus.' So it is misleading for

[38] *Ivey* (n 1) [60].
[39] ibid (emphasis added).
[40] ibid.
[41] ibid.
[42] ibid.
[43] To repeat what I said in section 1: honesty and naiveté often go together. Aristotle reflects memorably on the connections in *Rhetoric* 1389[a]3-1390[b]10: Aristotle, *The Rhetoric of Aristotle* (ed by JE Sandys, tr by R Claverhouse, CUP 1909) 98–103.

Lord Hughes to suggest that 'what is objectively judged' under the first leg of the *Ghosh* direction 'is the standard of behaviour, given any known actual state of mind of the actor *as to the facts*.'[44] If one is intent upon acquitting R of dishonesty, one probably needs to add 'where the facts include at least some of the applicable standards.' And then, obviously, one begins to wonder *which* of the applicable standards. And now one begins to see what motivates the second leg of the *Ghosh* direction. What motivates it is the importance of conveying that the defendant does get the legal benefit, in the dishonesty enquiry, of at least some mistakes about standards. I already said as much in section 1. I said that it can bear on someone's honesty or dishonesty whether she acted with conformity to other rules in mind, where the relevant 'other rules' are rules other than the very rule that constitutes the offence of dishonesty with which she is charged.

As examples I mentioned the rules of a profession and the rules of a game. We could now add the rules of a public transport system to the list. One thing they seem to have in common, which may be what makes room for honest mistakes about them, is that they could imaginably have been quite different rules. They exist to solve co-ordination problems, either in isolation or as part of a co-ordinative practice in which they are interwoven with other rules. Their content is in that specific sense arbitrary: we measure in kilometres, but we could have measured in miles; we have the rule 'throw a six to start' but we could have made it 'throw a double'; we insist on a ticket before boarding the train, but we could have opted for a 'pay on board' rule; and so on. Challenged upon breach of the rule, one can reasonably protest: 'To know that rule, I'd have needed to know what people do around here, or what decisions have been made by your authorities, or such like.' One can reasonably protest in the same way, it seems to me, about many if not all rules of private property.[45] They are more or less arbitrary ways of co-ordinating the use of resources. They could have been quite different. Hence the deeming provision included for the avoidance of doubt in section 2(a) of the Theft Act 1968: 'A person's appropriation of property belonging to another is not to be regarded as dishonest [...] 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.'[46] Such a person may be petty, vindictive, grasping, or morally deficient in any number of other ways. But without more he is not dishonest.

Offences of dishonesty, then, present us with an important caveat to the old

[44] *Ivey* (n 1) [60] (emphasis added).

[45] See John Gardner, 'Private Authority in Ripstein's Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 52.

[46] Theft Act 1968, s 2(a).

maxim *ignorantia juris neminem excusat.* One is not dishonest (although one may be exhibiting other defects of character worthy of legal attention) if, when one acts, one is trying to conform to what one mistakenly takes to be the rules of whatever one is doing, where awareness of those rules would in turn require awareness of some social facts (customs, practices, decisions, etc.) that explain why those are the rules. One's efforts to conform to them, even as one gets them wrong, acquit one of dishonesty. But that is not because one has latitude to be any less honest than the person who does not get them wrong. On the contrary: trying to follow them while getting them wrong is simply *a way of being* no less honest than the person who gets them right and follows them. There is no question of letting one have the benefit of one's own errors about honesty, where that means giving one extra latitude to be counted as honest in respect of what other people, more honest, would regard as dishonest. For one was not dishonest even by those other people's standards, or even by the highest possible standards, so long as one was trying to conform to the rules, even though one had the rules wrong (and even, notice, if one was at fault in having the rules wrong). One made an honest mistake.

According to this line of thought, R does not get to say: 'We are less honest in Duplicitania than you are in England, so I had no idea that riding on your buses without paying would be regarded as dishonest.' R only gets to say: 'We don't pay for bus travel in Freetransitania as you do in England, so I had no idea that I was supposed to pay a fare. Even the most impeccably honest person could make the same mistake. It was an honest mistake.' On the facts of *Ivey*, similarly, the mere fact that the defendant (maybe inhabiting a subculture of hard-nosed high-stakes gamblers?) did not know that anyone would regard him as dishonest clearly does not mean that he was honest. But if he had made an error about the rules of Punto Banco Baccarat, or about the rules of Genting Casino, and tried to follow what he took to be those rules, that would be a different matter. (As it happens, the defendant in *Ivey* did not make an error about either of those things. He knew the rules of the game and of the Casino. That is why he attempted a surreptitious scheme to get round them. On the facts treated by the Court as having been proved at trial, he was, in my view, both dishonest and a cheat.)

It is a charitable reading of the *Ghosh* direction that this – the need to bend to the defendant's ignorance of arbitrary local rules – is the 'subjective'[47] aspect of dishonesty that the Court of Appeal was originally trying to capture in the second leg:

> If [what the defendant did] was dishonest [by ordinary]

[47] *Ghosh* (n 15) 1064.

> standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.[48]

It is a worry about the decision in *Ivey* that it seems to leave no trace at all of this aspect in the jury direction that is to be used from now on. I say 'seems' because, as already mentioned, Lord Hughes does not get into the business of how a criminal trial judge should direct a jury. But if a criminal trial judge were to attempt to draw a jury direction directly from Lord Hughes' statements of the law, he would find some equivocation. Recall Lord Hughes' two formulations:

> [The] rule [is] that, once the defendant's state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or magistrates.[49]
>
> When once [the defendant's] 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.[50]

Which formulation to use? Is it only the defendant's mistaken belief *as to facts* that falls to be established before applying the ordinary standards of honesty (second formulation)? Or does the defendant also get the benefit of mistaken beliefs more generally (first formulation), including beliefs about the applicable rules? To ensure the acquittal of R it would presumably have to be the second. What matters is 'a state of mind [...] as to the facts' only in an extended sense in which the rules and other standards to which the actor is subject sometimes qualify as facts.

The jury optimization problem, in the context of dishonesty, is the problem of whether this subtle point really needs to be conveyed to the jury. The Court of Appeal in *Ghosh* favoured an affirmative answer, and then tried to express the subtle point in an unsubtle way that does not capture it exactly. The Court in *Ivey* might instead have given a negative answer: that the subtle point is better left unexpressed than *either* expressed exactly (too

[48] ibid.
[49] *Ivey* (n 1) [57].
[50] ibid [74].

complicated) *or* expressed in the *Ghosh* way (too lenient). However, the Court does not give this negative answer. It does not acknowledge the subtle point at all, and it does not confront the key problem of how best to express this point, or any other point, optimally to a jury.

This brings us to the objection in *Ivey* that the second leg of the *Ghosh* direction is too lenient, which is the objection that Lord Hughes lists first. He says, to repeat, that thanks to the second leg, 'the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour.'[51] Is this true? Not across the board. People with warped standards of honesty may well be perfectly aware that other people around them (namely, the ordinary honest people that they regard as mugs) set higher standards of honesty. True, as Lord Hughes points out, such rogues and chancers may convince themselves that they are not really dishonest, i.e. that the mugs are setting the wrong standard.[52] But the *Ghosh* direction does not give the rogues and chancers the benefit of *this* error;[53] it gives them the benefit of errors only about whether they are dishonest by the standards of those whom they disdain as mugs, the ordinary folk who lack their canny outlook.

Lord Hughes persists: some people, he says, are so convinced by the righteousness of what they do that they couldn't imagine *anyone*, however much of a mug, thinking it dishonest.[54] He repeats a nice example from *Ghosh*, that of an ardent anti-vivisectionist who rescues animals from laboratories.[55] It seems to me that this example, as deployed in both cases, leaves hostages to fortune. As the story stands, I do not see the dishonesty in it at all. The anti-vivisectionist should perhaps be criminally liable but, given the element of dishonesty in the statutory definition of theft, he or she should not be convicted of theft. I wondered whether Lord Hughes' logic in borrowing the example was this: such a person is clearly a thief; theft is defined as dishonest under the Theft Act 1968; therefore such a person must be dishonest. But this logic is back-to-front. If such a person is clearly a thief, then theft should not be defined in terms of dishonesty. For this person does nothing dishonest.[56] It is different if she disguises

[51] ibid [57].

[52] ibid [59].

[53] It has sometimes been abbreviated in such a way as to give the benefit of this error: see the comments in *Ivey* (n 1) [61] (Lord Hughes), and see the trial judge's inaccurate summary of the *Ghosh* direction as quoted by the Court of Appeal in *R v Woolven* [1983] 77 Cr App R 231, 236 ('*Woolven*').

[54] *Ivey* (n 1) [59].

[55] ibid [58].

[56] Similarly, 'the burglar who steals from an empty house after breaking in is not being dishonest … [h]e is an honest criminal': Wallace, (n 5) 107. That such people are routinely adjudged to have been dishonest under the Theft Act 1968, s 9 is a curiosity. One worries

herself as a scientist to infiltrate the lab, or obtains a fake ID card, or bribes a security guard, or something like that. Then she is dishonest in *how* she rescues the lab animals. Would she be well-advised to argue that, as she saw it, nobody could possibly regard such tricks as dishonest, given the righteous ends to which they are being put? The argument would be implausible and personally I doubt whether any conscientious jury would accept it. True, dishonesty is analytically unjustified and unexcused. That is what differentiates it from merely imperfect honesty. The imaginary anti-vivisectionist might think that the ends justify the means, and hence that she could not have been positively dishonest in deploying these means. But could she really imagine that people outside her movement would agree that the ends justify the means? And that *these* ends justify *these* means? A jury hearing the anti-vivisectionist say that she did not realise that these tricks were dishonest by ordinary standards is, in my view, unlikely to believe her.[57] Why would one need to resort to trickery if one thought that ordinary folk like receptionists and security guards would already regard one's ends as so glorious that they would justify one's means? Part of the anti-vivisectionist's gripe (and part of her case) is presumably that such tricks are widely regarded as unjustified and dishonest but that, if only the terrible plight of lab animals were more widely appreciated, they would not be so regarded. If the jury is persuaded by her plea on behalf of the animals, the defendant wins on the first leg of the *Ghosh* direction. The jury holds her not to have been dishonest by the correct standards of ordinary honesty that they are there to apply. But precisely by winning this way on the first leg, she loses on the second. It is a lot harder to see how could she could ever expect to win on the second leg while losing on the first.

Yet maybe the jury, directed in *Ghosh* terms, would feel differently in the case of the fare-dodging visitor from Duplicitania who says that people in England set much higher standards of honesty than he is used to at home. To me, that seems like the one kind of case in which the second leg of the *Ghosh* direction really does risk inviting excessive leniency. But it also casts a shadow, as we noted in section 2, on the first leg. For the first leg does not make clear whether the standards of the ordinary honest person are *ever* supposed to be relativized to the prevailing standards of a particular time and place, e.g. here and now. If they are not, and I think they are not, then someone who complains that the prevailing standards in England are too high for someone from Duplicitania does not have much to complain about. The standards being applied by the jury are supposed to be the correct standards, not the prevailing local ones, and hence not

that what I conjectured to be 'Lord Hughes' logic' leads many judges and juries astray.

[57] For a similar example similarly explored see Jonathan Herring, *Criminal Law: Text, Cases and Materials* (3rd edn, OUP 2008) 522.

in any way inapplicable to Duplicitanians. Could a Duplicitanian reply that, being a morally miseducated Duplicitanian, he just doesn't know the correct standards, the ones that apply to him as well as to everyone else in the world, and *that* is why he should benefit from the leniency of the second leg? Let me be the first to agree that such leniency would be excessive. It is one thing to give people the benefit of mistakes about arbitrary rules that apply around here to help solve co-ordination problems; it is quite another to give people, however miseducated, the benefit of their moral mistakes.[58] I am a notorious but still resolute supporter of the Aristotelian view that not having been properly habituated into the art of virtuous action cannot be any kind of answer to a charge that one lacks virtue, in particular any kind of excuse, since not having been properly habituated into the art of virtuous action is *just what it takes* to lack virtue.[59]

So for me it is indeed a major strike against the second leg of the *Ghosh* direction that it might avail the morally miseducated Duplicitanian. It is not, however, a decisive strike. The question remains of how to frame a jury direction that does not avail the morally miseducated Duplicitanian while still ensuring that the requisite latitude is given to the Freetransitanian who merely gets the local transport rules wrong. This is the jury optimization problem that the Court in *Ivey* leaves undiscussed.

5 A constitutional postscript

That the Court in *Ivey* leaves undiscussed the jury optimization problem is the main worry about the decision that I have emphasised here. It is not, however, my main worry about the decision. If my invitation to contribute to the Yearbook had not nudged me in a different direction, I might instead have written about the Court's failure in *Ivey* to discuss the limits of its own powers under the doctrine of *stare decisis*. Lord Hughes invites us (although not in these words) to treat the decision in *R v Ghosh* as overruled.[60] Yet his careful and admittedly damaging critique of *Ghosh* is entirely confined to *obiter dicta*. One may say that this is a fitting irony, since the *Ghosh* direction is itself to be found among Lord Lane CJ's lengthy *obiter* reflections in *Ghosh*.[61] But the *Ghosh* direction was later treated as law in cases in which it formed part of the *ratio decidendi*, including at least one further case in the Court of Appeal.[62] The Court of Appeal (and courts

[58] For some critical remarks on this way of carving up the terrain, see Douglas Husak, *Ignorance of Law* (1st edn, OUP 2016) 226-47.

[59] See John Gardner, *Offences and Defences* (1st edn, OUP 2007) 121-140. On Aristotle on lack of habituation, see Nancy Sherman, *The Fabric of Character* (1st edn, OUP 1989), ch 5.

[60] *Ivey* (n 1) [74].

[61] As remarked in ibid [55] (Lord Hughes).

[62] *Woolven* (n 53).

below) are bound by the *ratios* of Court of Appeal cases. Can such cases, complete with their *ratios*, be overruled by the Supreme Court in *obiter dicta*, however carefully argued? My understanding of the law, prior to *Ivey*, is that they cannot. A binding Court of Appeal authority can certainly be disapproved or doubted in *obiter dicta* in the Supreme Court (as in the House of Lords before it). But to be overruled – to be rendered no longer the law of the land – the *ratio decidendi* of the earlier Court of Appeal case must be inconsistent with the *ratio decidendi* of the later Supreme Court (or House of Lords) case. If disapproved or doubted only *obiter*, the Court of Appeal case still binds under *stare decisis*.[63] This doctrine helps to inhibit law-reform opportunism by our highest tribunal. It thereby helps to police the line between adjudication and legislation. It may be that *Ivey* marks the death of the doctrine. But if so, the desirability and legitimacy of its being put to death should have been discussed by the Court. And if there is no such doctrine, as some may say, then some reflection is needed on how law-reform opportunism by our highest tribunal is supposed to be contained by law. Indeed, some reflection on that topic may already be overdue.[64]

[63] For reflections on the point, see Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn, OUP 1991) 128-9.

[64] I am thinking of the decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, which overruled the House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340 (HL) without reviewing the application of the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL), that being the legal source of the applicable power to overrule: see *R v Shivpuri* [1987] AC 1, 18.