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# Mistaking theft: Dishonesty 'turns over a new leaf'

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## Abstract

The common law doctrine of mistake of fact or civil law works as denial of offending, but dishonesty works as one of the definitional elements of crimes such as theft and fraud. It is argued in this article that the rulings in *R v Barton* [2020] 3 WLR 1333 and *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2018] AC 391 do not change the doctrine of mistake of fact or civil law but do change the law in respect of mistakes about what is honest. A defendant whose conduct is taken as dishonest according to community standards may well avoid criminal liability if he was genuinely mistaken about a fact or civil law right. It is submitted that since the doctrine of mistake of fact or civil law is already provided for, the law is not expanded greatly by the rulings in *Ivey* and *Barton* which merely bring back the objective test of dishonesty that had long been established before the *Ghosh* test. The decision in *Barton* is substantively welcome, even though the change in the law arose from a civil law case where dishonesty was not an issue before the court.

## Keywords

Dishonesty, theft, mistake of fact or civil law, claim of right, community standards, consent

## Introduction

Williams argued persuasively that an unreasonable mistaken belief in a claim of right provided a defence to larceny, which covers not only mistake of civil law right but also mistake of fact.<sup>1</sup> Both kinds of mistake show that the taking was without the requisite intent.<sup>2</sup> On a belief in a moral claim of right, Williams wrote: 'But in exceptional circumstances belief in moral right may show that the act is not done [dishonestly]'.<sup>3</sup> As we will see below, in Williams's latter writings he made it clear that it was not for the thief to put forward his own standard of moral right or of normative honesty. The standards of honesty

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1. G Williams, *Criminal Law, The General Part* (2nd edn Stevens & Sons, London 1961) 305–331.

2. *Ibid.*, 322.

3. *Ibid.*

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are those that are recognised as objectively valid in English society, not what the thief presents as subjectively honest.

In 2018, after 35 years, the subjective prong of the dishonesty test laid down in the decision of the Court of Appeal in *R v Ghosh*<sup>4</sup> was abrogated in *obiter dicta* statements by Lord Hughes in *Ivey v Genting Casinos (UK) (trading as Crockfords Club)*,<sup>5</sup> which was a civil case. This article considers the law of dishonesty in light of the recent decision of the Court of Appeal in *R v Barton*,<sup>6</sup> where a strong Court of Appeal (Lord Burnett LCJ; Dame Victoria Sharp PQBD; Fulford LJ; McGowan J; Cavanagh J) followed Lord Hughes' *dicta*. Not only did the Court of Appeal follow it, but they did so with alacrity. Lord Hughes took the view that the law of dishonesty had taken a wrong turn in *Ghosh*.<sup>7</sup> The primary reason given by Lord Hughes was that the law prior to *Ghosh* had required dishonesty to be determined objectively against normative standards of honesty prevailing in the community — not by the defendant's own belief about what practices are honest.

Griffiths provides an analysis of the law predating the *Theft Act 1968* on dishonesty in relation to cheating, where the test of dishonesty did appear to be an objective test.<sup>8</sup> The defendant's view of what counted as honest was not relevant for the purposes of obtaining a conviction for cheating. The general part doctrine of mistake can apply to any genuine mistake of fact or civil law that negates the *mens rea* of a crime,<sup>9</sup> and it does not matter whether it is considered as a 'claim of right' issue or a lack of dishonesty issue, since either way it is a mistake of fact or civil law that is doing the work of negating the *mens rea* elements.<sup>10</sup> It will normally be raised as a claim of right: D believed it was his umbrella that he was taking, and thus he was not intending to deprive another of it. *Barton* and *Ivey* have no impact on subjective mistakes of fact or civil law raised under the claim of right defence; rather, their focus is on mistakes about what is normatively dishonest according to community standards.

The appeal in *Barton* provided the Court of Appeal with an opportunity to put an end to the uncertainty that followed the decision in *Ivey*. The uncertainty was not about Lord Hughes' interpretation of the substantive law, but whether his *obiter dicta* should be followed as a matter of precedent. Stark and others are rightly critical of the way the law was changed.<sup>11</sup> Stark points out that courts must advance the law's narrative in a way that possesses a meaningful coherence with the past, so as to avoid the impression that judges have assumed the role of the Parliament.<sup>12</sup> However, *Ivey* seems distinguishable from *R v Jogee*<sup>13</sup> because *Jogee* seems to have been supported by a wealth of precedents, even though the modern precedents were discordant. The decision in *Jogee* stuck to the central issue before the court, and the weight of precedents in support amply matched the discordant modern authorities. The court in *Ivey* took the radical step of changing a law that was not an issue for the decision it was deciding. Moreover, the 'mood music' (to use Stark's test)<sup>14</sup> of Parliament for some decades has been towards

4. [1982] QB 1053.

5. [2018] AC 391.

6. [2020] 3 WLR 1333. See also *Burns v Burns* [2021] EWHC 75 (Ch).

7. (n 4).

8. Cerian Griffiths, 'The Honest Cheat: A Timely History of Cheating and Fraud Following *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67' (2020) 40 LS 252.

9. *DPP v Morgan* [1976] AC 182; *R v Williams (Gladstone)* [1984] 78 Cr App R 276; *Beckford v The Queen* [1988] AC 130. It was held in *Williams (Gladstone)* and *Beckford* that crimes of assault or homicide require the defendant knew his act was unlawful, and that the defendant's honest mistake as to the need for self-defence negates such knowledge. This general part doctrine of mistake is not applicable to offences under sections 1–4 of the *Sexual Offences Act 2003* as far as belief in consent is concerned, because the Act has made 'no reasonable belief in consent' a specific *mens rea* element for these offences.

10. *R v Smith* [1974] QB 354, 360.

11. See F Stark, 'Judicial Development of the Criminal Law by the Supreme Court' (2020) 0 OJLS 1; Zach Leggett, 'The New Test for Dishonesty in Criminal Law—Lessons from the Courts of Equity' (2020) 84(1) *The J Crim L* 37; Karl Laird, 'Dishonesty: *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)*' (2018) 5 Crim L R 395.

12. Stark (n 11) 8.

13. [2017] AC 387.

14. Stark (n 11) 2.

subjectivism as illustrated by section 8 of the *Criminal Justice Act 1967*, section 1 of the *Homicide Act 1957* and section 44 and section 45 of the *Serious Crime Act 2007*.<sup>15</sup> The Supreme Court rarely considers criminal cases, and most of its decisions have been fairly conservative and predictable. I share Stark's view that *obiter dicta* in a civil law case should be followed with great caution.<sup>16</sup> Nonetheless, *Ivey* was a rare case of an unpredicted decision that extended the law and there is no pattern of this sort of judicial activism being adopted by the Supreme Court.

In *Barton*, the Court of Appeal held that it was satisfied that the decision in *Ivey* was correct. In this article, it is argued that Lord Hughes' correction of the *Ghosh* test is to be welcomed and that objective test will have little impact in practice since the general part doctrine of mistake still exculpates innocent people who are subjectively mistaken about a civil law right or a fact. Below I will start the analysis of dishonesty by looking at the *Barton* case first. In Part III and IV, I will distinguish the general part doctrine of mistake (which denies *mens rea* of a crime) from mistaken dishonesty and argue that an objective test was always meant to apply to dishonesty (which is an element of the crime). It will be argued that a normative standard cannot be subjective; otherwise, it is not normative. It has to be at least intersubjective in that it is a recognised standard.<sup>17</sup> Part V discusses the opposing viewpoints that the objective test of dishonesty is no better than the *Ghosh* test, and it is argued that the objective test has long been recognised in pre-*Ghosh* common law. Part VI discusses the issues surrounding gift-giving and mistaken consent in light of the ruling in *Barton*. It is argued that where the defendant has a genuine belief in valid consent, the doctrine of mistake of civil law or fact will negative his *mens rea* including dishonesty and that where the gift is induced by undue influence, the defendant cannot avail himself of a mistake of civil law or fact or of a lack of dishonesty.

## The Case of *R v Barton*

A précis of facts of *R v Barton* makes one wonder how his counsel thought the *Ghosh* test would help him. David Barton (known as Ramamurthi Dasaratha Naidoo until 2005 when he changed his name by deed poll) had taken more than £4 million dishonestly from numerous elderly residents at a Nursing Home he owned and managed. Barton also tried to claim a further £10 million from the estate of an elderly resident. Over decades, Barton targeted, befriended and groomed wealthy and childless residents of his care home to acquire their property. He would acquire their power of attorney within weeks of them arriving in his care home and alienate them from their previous contacts including their financial advisors, lawyers and family members. It appears all the victims had full mental capacity, but due to their physical frailty and sense of helplessness, Barton was able to exert undue influence over them and manipulate them.<sup>18</sup> Barton claimed the millions he acquired from these elderly residents were valid gifts, but the facts show what he had acquired were invalid gifts procured by unconscionable conduct,

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15. *R v R* was predictable, but its retroactive application contrary to art 7 of ECHR was not. For two possible interpretations, see Dennis J Baker, *Reinterpreting Criminal Complicity* (Routledge, Oxford 2016); and A P Simester, 'Accessory Liability and Common Unlawful Purposes' [2017] 133 LQR 73. The Homicide Act 1957 abrogated felony murder for perpetrators, so it is difficult to see how Parliament's mood in 1957 was to keep a form of felony murder for accessories. To give the Supreme Court less interpretive power than used in *R v Jogee* would erode too far its interpretive role. See too decisions such as *R v Woollin* [1999] AC 82 and *R v G* [2004] 1 AC 1034.

16. Stark (n 11) 14.

17. Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' 39 UCLA L Rev 1659, 1669; Christine M Korsgaard, *The Sources of Normativity* (CUP, Cambridge 1996) 143; Jakob v H Holtermann, 'A Straw Man Revisited: Resettling the Score Between HLA Hart and Scandinavian Legal Realism' (2017) 57 Santa Clara L Rev 1, 30.

18. When 'the means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will'. *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773, 795; *R v Jouman* [2012] EWCA Crim 1850 [24].

undue influence and an abuse of a position of trust.<sup>19</sup> It beggars belief that the Office of the Public Guardian had not intervened.

Barton groomed his victims in order to become their next of kin and power of attorney. He also became an executor and beneficiary of their wills. He sold off their assets put in their bank accounts and then syphoned their bank accounts dry. Furthermore, he sold two very elderly and frail women his Rolls Royce cars, each worth between £100,000 and £150,000, but sold for £500,000 per car. After they passed away, Barton obtained both cars back through a sham inheritance. It seems that Barton's fraud was exposed in part when he tried to claim £10 million from the estate of Mrs Willey.

After Mrs Willey's death, and before her funeral, David Barton began preparing a claim on behalf of himself, Lucinda Barton and CCL, against the estate and Mr Willey. Particulars of Claim were lodged in the High Court on 3 February 2014. The proceedings claimed specific performance of the whole life agreement (although it had not been signed) or, in the alternative, the sum of £9,787,612, including VAT, for services rendered. These claims were based on false invoices, sham contracts, and fabricated care records. David Barton was in control of this claim throughout and discussed the contents of the financial reports with the expert whom he retained to write them.<sup>20</sup>

Barton managed to isolate Mrs Willey from her friends, siblings, nephews and nieces and employees whom she had previously had close relationships with.

Perhaps the most egregious part of the claim related to fees due for taking Mr Willey on drives out in classic cars. This part of the claim was costed at £7.2 million (including VAT). This was on the basis of David Barton's assertion that there was an understanding that there would be a payment in excess of £25,000 per day for Mr Willey's drives out, which were a means of managing his condition.<sup>21</sup>

Barton wanted the jury to believe that it was honest for him to sell a Rolls Royce for four times its actual value to an elderly frail person in his care and thereafter for him to inherit the car. He also wanted to convince the jury that it was honest for him to charge Mr Willey £25,000 a day for his drives out. Barton had used the same tricks to acquire property belonging to several other wealthy and childless residents, but there is no need to recount all those facts here. We have enough facts to get the gist of the degree of dishonesty involved.

Barton's grounds of appeal, among other things, included the question of whether: '(i) Dishonesty: in particular, does *Ivey* provide the correct approach to dishonesty and, if so, is it to be followed in preference to the test described in *Ghosh*?'<sup>22</sup> The Court of Appeal started by quoting the *Ghosh* test as follows:<sup>23</sup>

... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. . . .

19. For an overview of the law on undue influence, see *Hart v Burbidge* [2015] 1 P & CR DG 9; and *Royal Bank of Scotland Plc v Etridge* (n 18).

20. *Ibid.*, [63].

21. *Ibid.*, [64].

22. *Ibid.*, [79].

23. *Ibid.*, [81].

Thereafter, the Court of Appeal quoted Lord Hughes' reformulation of that test as follows:

These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. . . . When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it was not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. *When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.* (Emphasis added)

## Dishonesty

The law before the *Theft Act 1968* referred to 'fraudulent' takings. Three hundred years ago, Dalton defined theft as: 'Theft is the fraudulent taking away of another man's movable personal goods, with an intent to steal them, against (or without) the will of him whose goods they be . . .'<sup>24</sup> Dalton also quoted the famous *Fisherman case* as an example of an honest robbery, where a person took from a fisherman his fish without consent (against his will), but paid more than the fish were worth.<sup>25</sup> The *Fisherman case* supports Griffiths' analysis: "'Fraudulent intent" was often a shorthand for the *mens rea* of illegally taking, but this was really used to differentiate between lawful and unlawful appropriation rather than adding a mental element to the act'.<sup>26</sup> The case rests on the notion that the defendant mistakenly believed he had a right to take the property as long as he paid. Hawkins suggested the principle laid down in cases such as the *Fisherman case* is that 'there seems to be no such enormity in the intention of the wrongdoer, as implied in the notion of felony'.<sup>27</sup> This could refer to a negation of *mens rea* or to lack of dishonesty, but there is insufficient detail to know what these 18th-century lawyers had in mind. It is not made clear whether the defendant was not liable due to not acting fraudulently or due to having a mistake of fact.

East wrote that where the defendant mistakenly believed it was his own property, his such claim of right denied any felonious intent.<sup>28</sup> He also wrote that one who drove another's sheep without knowing that they mixed with his own sheep did not have a felonious intent as the mistake of fact denied such intent.<sup>29</sup> In *R v Wade*,<sup>30</sup> it was held:

If the jury were of the opinion that the taking by prisoner was an honest assertion of his right, they were to find him not guilty, but if it was only a colourable pretence to obtain possession, then to convict him.

It was held in *R v Williams* that word 'fraudulently' in the *Larceny Act 1916* must mean the taking of property is done intentionally, under no mistake and with knowledge that the property is another's.<sup>31</sup> This interpretation implied there had to be some deception or trick, but that was never the case, and

24. Michael Dalton, *The Country Justice* (Rawlins, London 1697) 363.

25. *Ibid.*, 364; See also *R v Hemmings* (1864) 4 F & F 50, 51 *per* Erle, C J, holding it was not felonious to force a debtor to pay a debt, even though it would be a criminal assault. Such a conclusion was reached because dishonesty could not be established.

26. Griffiths (n 8) 262.

27. M Hawkins, *Treatise of the Pleas of the Crown* (Nutt & Gosling, London 1739) 97. Hawkins suggested that it ought to be treated as robbery, but Dalton left the question of felony open.

28. E East, *Pleas of the Crown*, vol 2 (Straham, London 1803) 659.

29. *Ibid.*, 661.

30. (1869) 11 Cox CC 549.

31. [1953] 1 QB 660, 666.

broader concept of dishonesty was adopted in the *Theft Act 1968* to make that clear.<sup>32</sup> Turner was of the view that the word ‘fraudulently’ ‘serves to indicate the offender must know that he is doing what is contrary to the standards of social conduct prevailing in the community’.<sup>33</sup> Turner also argued that while the criterion was meant to supplement the ‘with claim of right’ defence, it would rarely add anything more precise. In other words, most of the conduct that would be deemed to be honest should at least be supported by showing there was a genuine belief that the property could be legally appropriated. What is more important is the analysis given by Williams, where he summarises the case law from the 1750s through to the 1950s and defends claim of right as largely resting on a mistaken belief in a legal right or a mistake of fact.<sup>34</sup> Williams demonstrates that cases like the *Fisherman case* rest on no more than a genuine mistake (even if the mistake was unreasonable) that the defendant had a right to the property.

The old law illustrates that community standards were used to decide if the defendant took property fraudulently, and that a mistake of civil law or fact would negative the defendant’s *mens rea* for theft. The word ‘dishonestly’ in the *Theft Act 1968* is a substitute for ‘fraudulently’,<sup>35</sup> and thus the objective community standard for ‘fraudulently’ should continue to apply to ‘dishonestly’. The claim of right cases will usually refer to some mistaken claim of right in the law of property or contract law,<sup>36</sup> but the concept of dishonesty extends this to allow mistakes about what is conventionally regarded as an honest acquisition of property, if a reasonable person would have made the same mistake.<sup>37</sup> When the defendant has a genuine mistake as to civil law or fact, his *mens rea* for the crime is negated, including the dishonesty element. When the defendant does not make any mistake as to civil law or fact, he may still be exculpated if his conduct is objectively honest according to community standards.

S.2 (1) of the *Theft Act 1968* exists harmoniously with the doctrine of mistake of civil law or mistake of fact. S.2(1)(a) states that the defendant 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. This is no more than a restatement of the doctrine of mistake. S.2(1)(b) states that the defendant is not to be regarded as dishonest 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. This refers to a mistake of fact about the owner’s consent. S.2(1)(c) states that the defendant is not to be regarded as dishonest if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This also refers to a mistake of fact that the owner can not be found by taking reasonable steps. Other mistakes of fact that are not provided for by S.2 such as mistake about whether payment is expected can be dealt with by referring to the general part doctrine of mistake. The *Fraud Act 2006* does not have a provision like S.2 of the *Theft Act 1968*, but the general part doctrine of mistake of civil law or mistake of fact would work for fraud cases too.

The general part doctrine of mistake of fact or civil law is not affected by the decision in *Barton* — so subjective mistakes will count even if they are unreasonable. This is because the mistake of civil law or mistake of fact negatives the *mens rea* elements of a crime while dishonesty is one of the *mens rea* elements of property offences, such as theft and fraud.<sup>38</sup> Thus, it is not contradictory that the former

32. G Williams, *Textbook of Criminal Law* (Stevens & Sons, Hampshire 1978) 661.

33. J Cecil Turner, *Russell on Crime* vol 1 (11th edn Stevens & Sons, Hampshire 1958) 1129.

34. Williams (n 1) 305–331.

35. *R v Feely* [1973] QB 530, 537–538, 541; Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (Cmd 2977, 1966) para 39.

36. There may be rare cases where there is some belief that what is being done is not morally dishonest according to prevailing community standards, but most cases of honesty will fit within a legal right of some kind. *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

37. Williams (n 1).

38. Simester distinguishes the mistake going to the definitional elements of a crime and mistake going to the supervening defence such as self-defence. He argues that mistake going to the definitional elements of a crime need only be genuine, but mistake going to the supervening defence need be reasonable. A P Simester, *Fundamentals of Criminal Law* (OUP, Oxford 2021) 487–91. This article discusses mistake going to the definitional elements, which denies *mens rea* of the crime.

adopts a subjective test looking at the defendant's genuine belief while the latter adopts an objective test applying community standards. As for the Robin Hood type of situation, the defendant will be criminally liable, unless his mistake about the conventional norms of honesty is one any reasonable person in his position would have made. It has been suggested above that the dishonesty standard is a normative standard and thus is objectively determined through an intersubjective process. Therefore, the ruling in *R v Barton* is logical and cogent.

## Objective Dishonesty and Mistakes

The gist of dishonesty is that it refers to what is objectively dishonest according to the normative standards of the relevant society. The law predating the *Theft Act 1968* did not include a requirement that the wrongdoer had fault with respect to that standard: there was no requirement that D had an awareness of the community standard of dishonesty. The defendant need only intend to appropriate property without a genuine mistake as to fact or civil law — the legislation did not include any fault with respect to dishonesty.

However, the doctrine of mistake of civil law or fact does not cover ignorance of what society intersubjectively regards as dishonest. Take the example given by Lord Lane, C.J. of a foreign tourist visiting England and using public transportation without paying.<sup>39</sup> The foreign tourist assumes public transportation is free in England, because it is in her country of origin. Consequently, the visitor genuinely believes she is not obtaining the service dishonestly when she rides the bus from Heathrow into Charing Cross. The blameless fare evader is genuinely mistaken about the need to pay for the service. Her mistaken but genuine belief negates her *mens rea* for the offence under section 11 of the *Fraud Act 2006*, which includes knowledge that payment is or might be expected, intention to avoid payment and dishonesty. The fare evader also is mistaken about failing to pay a fare being a criminal offence in England and Wales,<sup>40</sup> but her mistake of fact about the need to pay a fare independently negates the *mens rea* required for the offence.

The general rule concerning mistakes about what is criminal is: *ignorantia legis neminem excusat* (ignorance of law excuses no one). A classic example is of the person who takes the wrong umbrella as he leaves the Club, believing it is his own umbrella. The mistake demonstrates he is not trying to appropriate property belonging to another<sup>41</sup> but is merely trying to take his own property.<sup>42</sup> The mistake is not about whether it is a crime to appropriate an umbrella belonging to another with an intention of permanently depriving that other person of the umbrella, but about a fact that negates his intention to deprive another of the property as well as his dishonesty. It also is not a mistake about whether it is objectively honest to take umbrellas one believes to be one's own. It is objectively honest to take property that belongs to oneself, and the mistake here is one of fact, not one of the normative standards of honesty.

In the example of the foreign traveller who inadvertently fails to pay the requisite fare for her ride on London's public transport, the facts might be judged as follows:

1. Fare evasion is dishonest when judged by community standards. It is a criminal offence, so there is no uncertainty in such a finding.
2. That person's honesty does not depend on her subjective view of whether it is honest or dishonest not to pay the fare, because had she known a fare was required she would have paid. She was not

39. *Ghosh* (n 4) 1063.

40. These norms of honesty have been underwritten by a series of laws over a long period and thus would be patently obvious to anyone communally situated in Britain. See *Fraud Act 2006*, s 11; *Theft Act 1978*, s 3.

41. *Williams* (n 1)199.

42. *Smith* (n 10) 360.



misjudging the standards of dishonesty but was mistaken as to facts that made her conduct dishonest.

3. Had she failed to pay the fare in a city where free public transportation is provided, she would have acted honestly.

Lord Lane, C.J.'s hypothetical traveller was not asserting 'if a fare is due, it would be honest for her not to pay it' or 'she though ordinary people would think fare evasion is honest'; rather, the foreign traveller was asserting 'if a fare is *not* due, it is not dishonest to fail to pay'. If the hypothetical traveller genuinely believed that such a fare was not due and that that was the reason she did not pay, then she acted honestly. What is negating her *mens rea* is a simple mistake of fact.

Horder argues:

In the foreign traveller example, the *Feely* test requires that the court consider whether a foreigner with the belief he or she held would be dishonest according to the ordinary standards of reasonable honest people. The answer surely would be no.<sup>43</sup>

Horder seems to take the view that the dishonesty doctrine alone is sufficient for protecting the foreign traveller. But such a person did not form the *mens rea* for the offence due to her lack of information. Objectively judged, fare evasion is dishonest, so Horder's analysis only works if the law also requires fault with respect to dishonesty, but the law only requires D to intend to appropriate property in a dishonest manner — it does not state that D must intend to act dishonestly. She need have no intention in relation to the honesty of her appropriation.

The key word in the pre-*Theft Act* case, *R v Williams*,<sup>44</sup> was 'mistake', which centred around the claim of right defence. The case essentially required intention but allowed room for it to be negated by a relevant mistake of fact or civil law. It was held in *Williams* that a person is not acting 'fraudulently' (before the *Theft Act 1968* the word 'fraudulently' was used instead of the word 'dishonestly')<sup>45</sup> if he takes away a suitcase in the mistaken belief that it is his own and that the word 'fraudulently' must mean the taking of property is done intentionally, under no mistake and with knowledge that the property belongs to another.<sup>46</sup> Such a person is not taken as acting fraudulently because he thought he was taking his own suitcase, not because he mistakenly thought taking another's property is not dishonest.

The issue is not about objective dishonesty, but about whether there was some subjective mistake of fact (here, whether it is his own property) that was sufficiently relevant to negate the defendant's *mens rea* including dishonesty. Mistakes about jurisdiction or procedure are not relevant mistakes and have no bearing on a person's awareness of the choices he is making with respect to the substantive elements of a criminal offence.<sup>47</sup> Fletcher rightly observes that a relevant mistake is one that 'bears on an issue that related to the wrong committed'.<sup>48</sup> Dishonesty is a constituent element of relevant property offences in English law and thus it can be negated by a mistake of fact or civil law. Later cases, such as *R v Waterfall*<sup>49</sup> and *R v Gilks*<sup>50</sup> are taken as having favoured a subjective test for dishonesty, but only in relation to mistaken beliefs having a right to take the property. These are essentially claim of right, cases that do not need to delve into the issue of dishonesty, because if a person genuinely believed he had a claim of right that, will negative the *mens rea*, including dishonesty. *R v Royle* was a case where there

43. J Horder, *Ashworth's Principles of Criminal Law* (9th edn OUP, Oxford 2019) 401.

44. [1953] 1 QB 660.

45. A T H Smith, *Property Offences* (Sweet & Maxwell, Mytholmroyd 1994) 263–64.

46. *Williams* (n 44) 666.

47. *Williams* (n 1) 185.

48. G Fletcher, *Basic Concepts in Criminal Law* (OUP, Oxford 1998) 149–50.

49. [1970] 1 QB 148.

50. [1972] WLR 1341.

was no mistake of fact, and the defendant knew that W. Ltd was a bogus company.<sup>51</sup> The issue was whether the defendant made false representation dishonestly. The court seemed to have conflated the test for false representation with the test for dishonesty. This was later clarified in *R v Greenstein*, where it was held that whether there is false representation should be decided by assessing the defendant's actual state of belief as to its truthfulness, and that once false representation is proved it is for the jury to apply their own standards to decide if such a false representation is dishonest.<sup>52</sup> Unlike the *Ghosh* test, these cases did not require that the defendant appreciated that others would take his conduct as dishonest.

Where there is a mistake of fact or civil law, dishonesty is negated as it is one of the *mens rea* elements; but lack of mistake of fact or civil law and dishonesty are not the same thing. In *Feely*, it was stated that dishonesty provided an extra layer of protection. It was held in that case that the defendant might be exculpated by the fact that his conduct was objectively honest. A normative test based on the standards of ordinary decent people was introduced into the law.<sup>53</sup> Lawton L.J. suggested the transaction would have to be tainted by some moral obloquy.<sup>54</sup> Both *Williams* and *Feely* adopted an objective test for dishonesty. There is no hint in either of these cases of the factfinder trying to ascertain whether the defendant agreed with the community standard of honesty. After *Ghosh*, a defendant could run the defence that he believed ordinary people would not take his conduct as dishonest. Baker argues, 'The subjective approach to criminal liability, properly understood, looks to the defendant's intention and to the facts as he believed them to be, not to his system of values'.<sup>55</sup> Here he separates the mistake of fact doctrine from the mistaken dishonesty doctrine.

*Ivey* did not invent a new test for dishonesty, but just brought back the objective test before *Ghosh*. The adoption of this objective test<sup>56</sup> does not affect the application of the general part doctrine of mistake of civil law or fact. In *Ivey*, Lord Hughes held:

When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.<sup>57</sup>

An objective standard simply refers to the conventional norms about honesty. It is not concerned with whether the defendant was intending to act against the community standards or whether he was reckless in doing so.<sup>58</sup> The appropriation of property belonging to another will be judged by community standards, not the defendant's descriptive commitments.<sup>59</sup> This approach is taken to prevent the Robin Hood defence being invoked.

51. [1971] 1 WLR 1764, 1768.

52. [1975] 1 WLR 1353, 1362–63.

53. *Feely* (n 35) 538–39.

54. *Ibid.*

55. D J Baker, *Glanville Williams Textbook of Criminal Law* (4th edn Sweet & Maxwell, Mytholmroyd 2015) 1337.

56. 'The first stage is to ask what the facts were, as the defendant "subjectively" believed them to be. The second stage is, assuming such facts, to judge whether the response of the defendant was "objectively" reasonable'. *Ivey* (n 5) 413 (*per* Lord Hughes).

57. *Ivey* (n 5) 416–417, followed in *R v Barton* [2020] 3 WLR 1333.

58. 'This honesty goes beyond the attentiveness to detail and aversion to self-deception needed for life affirmation and introduces a distinct normative component'. A Harper, 'Nietzsche's Thumbscrew: Honesty as Virtue and Value Standard' (2015) 46(3) *J Nietzsche Stud* 367, 372.

59. P Dieveney, 'Ontological Infidelity' (2008) 165(1) *Synthese* 1, 7.

## Against Objective Dishonesty

The substantive ruling in *Ivey*<sup>60</sup> has been criticised because the Supreme Court changed a major doctrine of criminal law via *obiter dicta* in a civil law case. Simester and Sullivan rightly observe:

But this was *obiter dicta* in a civil case, and according to the normal rules of precedent this does not mean that *Ghosh* has been overruled; which, if it is to happen, requires a decision from a strong Court of Appeal.<sup>61</sup>

Nonetheless, the interpretation of the law as expounded by Lord Hughes and now applied by a strong Court of Appeal is largely correct. They also argue, ‘But with all due respect, abolishing the second limb of the *Ghosh* test warrants deeper thought than the Supreme Court gave it in *Ivey*’.<sup>62</sup> However, the level of thought given to the doctrine seems measured and careful, even if the process of using *obiter dicta* in a civil case to express that thought was not the proper venue. The reason it appears the level of discussion in *Ivey* seems largely right is that a deeper analysis would be for the Parliament not the Supreme Court. The *Ghosh* test is not complex, and Lord Hughes simply gave it a literal interpretation, which accords with all the authorities predating *Ghosh*, that the test for dishonesty is an objective one. Such an objective test does not exclude other exculpating factors such as mistakes of fact or civil law which are based on the defendant’s subjective beliefs.

Williams and more recently Baker<sup>63</sup> have both maintained the argument that *Ghosh* was not supported by authority as far as the subjective prong was concerned, because there was no mental element provided for concerning dishonesty. The defendant did not have to intend or foresee that to do X was or might be dishonest: all that was required was that the defendant intended to appropriate property without a genuine belief in a claim of right and in circumstances where the appropriation was objectively dishonest. The *Theft Act 1968* provisions do not require that the defendant intended to be dishonest or was reckless as to the fact that he was acting dishonestly. The test is simply about what the defendant in fact believed and whether the communally situated defendant complied with the normative standards of honesty recognised in the given legal jurisdiction.<sup>64</sup> Just after the decision was given in *Ghosh*, Williams wrote: ‘The extreme extension of the honesty defence to pure subjectivism<sup>65</sup> has now been slightly, but only slightly, curtailed by a case that one can only with difficulty refrain from turning into an expletive: *Ghosh*’.<sup>66</sup> There is little doubt that Lord Hughes’ *obiter dicta* accords with the authorities predating both *Ghosh* and the *Theft Act 1968*.<sup>67</sup>

In *R v Barton*, the Court of Appeal held:

Lord Hughes observed that the decision in *Ghosh* involved a departure from pre-1968 law, when no such divergence was intended. On careful analysis, it was not justified by the post-1968 jurisprudence, which tended, albeit with some inconsistency, to accept the approach preferred by the Supreme Court in *Ivey*. We agree with, but do not repeat, Lord Hughes’s analysis of the relevant authorities.<sup>68</sup>

60. *Ivey* (n 5).

61. A P Simester, J R Spencer, F Stark et al, *Simester & Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford 2019) 583. See also, Stark (n 11) 18; Griffiths (n 8) 267.

62. Simester (n 61) 586.

63. Baker (n 55) 1298–99, 1329–41.

64. *Ibid.*, 1330.

65. See G Williams, ‘The Standard of Honesty’ (1983) 133 NLJ 636; G Williams, *Textbook of Criminal Law* (Stevens & Sons, Hampshire 1983) 727; quoting *Boggeln v Williams* [1978] 1 WLR 873.

66. *Ibid.*, 728.

67. *Feely* (n 35); *Greenstein* (n 52).

68. *Barton* (n 6) [90].

These observations . . . were clearly *obiter*, and as a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision without the matter returning to the Supreme Court.<sup>69</sup>

We would not wish it to be thought that we are following *Ivey* reluctantly. The concerns about *Ghosh* have resonated through academic debate for decades. Lord Hughes's reasoning is compelling.<sup>70</sup>

For those that research and write on the ordinary rules of precedent,<sup>71</sup> there will be more to say about the authority of *obiter dicta* from the Supreme Court, but that is not a concern here as the focus has been on the substantive law concerning dishonesty. In a sense the *obiter dicta* is hard to argue against in terms of it simply correcting a wrong turn in the law and in terms of it not causing any injustice. The abrogation of the subjective prong in *Ghosh* certainly did not cause any injustice to Barton, because a properly directed jury was certain to return guilty verdicts under either test, given the gross manifestation of dishonesty in that case.<sup>72</sup> It is doubtful the Supreme Court will revisit the issue, and it is certain following *Barton*, that *Ivey* will be applied in all decisions going forward.

In many cases, the accused will defend a property offence by demonstrating that he had a genuine belief that he had a claim of right to the property.<sup>73</sup> This will often be done by pointing to some civil law property interest or equitable interest<sup>74</sup> or legal interests resonating from contracts and so forth. It will be done without needing to refer to the overarching honesty of the acquisition. In other cases, the accused will invoke a relevant mistake of fact.<sup>75</sup> As has been examined in a previous section, the pre-*Ghosh* case law, such as *R v Williams*,<sup>76</sup> *R v Feely*,<sup>77</sup> and *R v Greenstein*,<sup>78</sup> adopted an objective test for dishonesty. *Ivey* was not changing the pre-*Ghosh* law, but simply bringing it back. Nonetheless, it has been robustly critiqued by others. Griffiths argues that the Supreme Court has mistakenly united cheating under criminal and civil law, without considering how and why precedents clearly separate the two.<sup>79</sup> Stark contends that the real objection to *Ivey* is that the decision is not sufficiently clear to guide conduct.<sup>80</sup> However, the second prong of the *Ghosh* test was not controversial in practice because the jury simply would not accept absurd claims of beliefs in honesty. The more outlandish the belief, the less likely the

69. *Ibid.*, [95]. At para104, it is stated that: 'where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision'.

70. *Ibid.*, [106].

71. See the analysis by Stark (n 11); Laird (n 11) 398; Jeremy Horder, 'The Courts' Development of the Criminal Law and the Role of Declarations' (2020) 40 LS 42.

72. The summing up and application of the law to the facts in *R v Barton* [2020] 3 WLR 1333 is too lengthy to unpack here and is not relevant to the doctrinal analysis here. However, it is worth readers looking at paras 110–132. The deception, abuse of a position of trust, manipulation and general dishonesty was egregious to say the least.

73. *R v Balogun* [2016] EWCA Crim 174; See too *R v Brown* [2015] EWCA Crim 1593, where money was transferred to the defendant for the purpose of buying football tickets for the complainant. The defendant believed that the complainant permitted him to keep the money so that it could be reinvested in other business ventures and that at the end of this he would return the money or what was left of it. He therefore argued that he was not dishonest. *DPP v Gohill* [2007] EWHC 239 (Admin), where the defendants allowed customers to borrow items of equipment belonging to their employer without charge, which was against company policy. The customers who were afforded this privilege tipped the defendants £5 or £10. The defendants believed that they were entitled to the money as a tip and therefore argued that they were not dishonest.

74. One can imagine a situation where a person mistakenly thinks he maintains an equitable interest in a car that he has paid for, but does not because a bona fide third party has acquired legitimate title. See *Gray v Smith* [2014] 2 All ER (Comm) 359.

75. *Smith* (10) 360.

76. *Williams* (n 44).

77. *Feely* (n 35).

78. *Greenstein* (n 52).

79. *Griffith* (n 8) 267.

80. *Stark* (n 11) 18.

jury would accept it existed. Nonetheless, a fully objective standard prevents a jury of Robin Hoods exempting a person who acted dishonestly in the wider normative sense.

The second prong of the *Ghosh* test is believed to have the function of limiting the scope of theft-related offences and thus preventing innocent people, who subjectively believe their conduct is honest, from being held criminally liable.<sup>81</sup> Therefore, some scholars are concerned that the *Ivey* test of dishonesty will unreasonably expand the offence of theft, given *Hinks*<sup>82</sup> and *Gomez*<sup>83</sup> have already extended theft to almost any appropriation of property.<sup>84</sup> With all respect, this is not a convincing objection, because *Gomez* and *Hinks* involved not only conduct that was dishonest against community standards, but where there was no claim of right to negative dishonesty. This criticism against *Barton* overlooks that the general part doctrine of mistake of fact or civil law still exists to exculpate in addition to lack of dishonesty. A mistaken claim of right is the *raison d'être* of S.2 of the *Theft Act 1968*. A person cannot steal what he has a genuine and correct claim of right to, but he can steal what he has not claim of right to have. He can have his *mens rea* negated when his belief in the claim of right was a genuine mistake. The normal defence lodged under the *Ghosh* test runs something like: 'I thought I could commit a technical theft and get away with it, because many people take stationary from work for home use or use the work telephone to make personal calls and so on'. Here the only mistake is about the consistency and frequency of enforcement, because the defendant knows or ought to know that it is a technical theft — even if it might be too petty in most cases to attract the attention of the police.

If evidence could show that Gomez and Hinks genuinely believed the owners consented to them taking the property because they wanted them to have it, then they ought not be liable. Nonetheless, the more fanciful the belief the less likely the jurors are to believe it was genuine. Gomez knew the cheques were stolen and worthless, but he lied to his manager that they were as good as cash. There was ample evidence for a factfinder to infer that Gomez did not genuinely believe the manager consented to goods being transferred in return for stolen cheques. Hinks knew she was fleecing a vulnerable man of his life savings, and thus there was ample evidence for a factfinder to infer that Hinks did not believe there was genuine consent.<sup>85</sup> It was fairly clear that there did not appear to be consent untainted by undue influence; the influencer can hardly make a case that she genuinely believed the vulnerable victim consented of his free will. Thus, *Ghosh* test does not save such defendants, because they had no claim of right, were not mistaken and were objectively dishonest.

As far as certainty and art 7 of the ECHR are concerned, it is submitted that it will be rare for a jury to need to decide standards of honesty, because most dishonesty relates to the defendant not being able to explain why it was lawful for him to acquire another's property without consent or provide some other normative justification for the acquisition. There is far more certainty in having an objective test rather than one where some jurors will accept a subjective mistake about the community standard of dishonesty when the next might not. If anything, *Ivey* and now *Barton* have made the law more certain — even if it cannot be perfectly certain. The more warped the defendant's standards of honesty are, the more likely he might argue that he genuinely believed others would think that his conduct is not dishonest. It is at least now certain in that the defendant does not get to decide his own standards of dishonesty.

In complex financial fraud cases, Horder argues that any difficulty in determining what was dishonest can be resolved through calling expert evidence.<sup>86</sup> Expert witnesses do not decide what is or what is not dishonest, but their evidence can help jurors to decide such issues, especially when the defendant's conduct is far removed from ordinary people's experience. If we are hell-bent on maintaining a system of

81. Lindsay Farmer, *Making the Modern Criminal Law* (OUP, Oxford 2016) 220–21; Horder (n 43) 404.

82. [2001] 2 AC 241.

83. [1993] AC 442.

84. Simester (n 61) 586; Leggett (n 11), 46–47; J R Spencer, 'Two Cases on the Law of Theft: a concertina movement?' (2018) 8 Arch Rev 4, 5; Graham Virgo, 'Cheating and Dishonesty' (2018) 77(1) CLJ 18, 21.

85. *Hinks* (n 82) 253.

86. Horder (n 43) 404.

trial by jury for complex tax and fraud cases and so forth, then it seems misplaced to claim some doctrines are unsound on the basis that jurors might become confused.

Moreover, there are far more complex matters that go to juries than considering if a conduct is objectively honest when measured against community standards. In many of these cases, it will not be a complex matter determining what is normatively honest, even if the transactions and law involved are complex. Take the LIBOR scandal for instance, there was no mistake of fact or civil law. The defendants knew it was an offence to manipulate the LIBOR rate, but attempted to argue that they genuinely believed they had a moral right to do it because many others were doing it and had been getting away with it for years.<sup>87</sup> It hardly requires expert evidence for a jury to understand that it is not objectively honest to act on the belief that detection is unlikely because many others are doing it and are getting away with it.<sup>88</sup> The idea that the second prong of the *Ghosh* test provides a ‘many others did the same’ defence<sup>89</sup> seems misplaced. The defendant’s awareness that co-workers are doing the same dishonest act does not necessarily mean that he is not aware that what they are doing is dishonest in the eyes of ordinary decent people. That 40 plus MPs were caught up in the United Kingdom parliamentary expenses scandal,<sup>90</sup> hardly demonstrated that each of them believed it was honest to be claiming for non-work related expenses or that they genuinely believed ordinary people would think it is honest to do so. The second prong of *Ghosh* test would not exculpate such defendants either.

## Mistaken Consent and Dishonesty

Further issues that were raised in *Barton* were consent and capacity. Genuine consent makes a gift valid in contract law<sup>91</sup> — the normative status of gift-giving is distinct from theft.<sup>92</sup> Where the donor who is capable of understanding all the circumstances of the transaction makes a valid gift, no criminal liability should be attached to the donee because the donee genuinely believes the donor consents to the transaction. Genuine belief in valid consent negatives his *mens rea* for theft, including dishonesty. A person might genuinely make a mistake of fact about consent or the civil law of undue influence, duress and so on and thus assume there was genuine consent. As long as his belief was genuinely held, he is protected by the general part doctrine of mistake of fact or civil law. As usual, the more unreasonable the belief was, the less likely the factfinder would accept it existed. Even if the defendant’s accepting a large amount of money from his vulnerable victim is objectively dishonest, he can still escape liability if he had a genuine belief that there was true consent from the victim. If that is established, there is no need to go on and also consider the dishonesty constraint.

If the donor’s consent is tainted by fraud, coercion or undue influence, the donor is entitled to set aside the gift.<sup>93</sup> The factfinder will rarely find that the defendant had a genuine belief that gift was freely given, when he used fraud, coercion or undue influence.<sup>94</sup> No injustice will be caused to defendants such as Hinks and Barton, because they would likely be convicted under either *Ghosh* or *Barton*. If the victim

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87. *R v Hayes* [2018] 1 Cr App R 10; *Hussein v Financial Conduct Authority* [2018] UKUT 186 (TCC).

88. *R v H* [2015] EWCA Crim 46.

89. Matthew Dyson and Paul Jarvis, ‘Poison Ivey or Herbal Tea Leaf’ (2018) 134 (Apr) LQR 198, 202–203.

90. *R v Chaytor, R v Morley and R v Devine* [2011] 1 AC 684; J Rogers, ‘Dishonesty in the First LIBOR Trial’ (2016) 3 Arch Rev 7, 8.

91. See chapters 6, 7 and 8 of Hugh Beale, *Chitty on Contracts* (33rd edn Sweet & Maxwell, Mytholmroyd 2019) discussing undue influence, mistake, misrepresentation and duress.

92. ‘To say that the law requires true consent is therefore, in fact, to say that defences are such as undue influence or coercion, and any others which should be grouped with them are admitted’. H L A Hart, ‘The Ascription of Responsibility and Rights’ (1949) 49 Proc Aristot Soc 171, 178; See also, D Carr, ‘Is Gratitude a Moral Virtue?’ (2015) 172(6) Philos Stud 1475.

93. G McBain, ‘Modernising the law of gift’ (2016) 5 (1) Int Law Res 168, 218.

94. *R v Jouman* [2012] EWCA Crim 1850; *Royal Bank of Scotland Plc v Etridge* (n 18).

is incapable of making a gift, the gift is void.<sup>95</sup> A defendant who knew his victim was incapable of making a gift and exploited the victim's vulnerability to acquire property is dishonest according to community standards. He is not mistaken about a fact or a point of civil law. However, if he did not know about the victim's incapacity and mistakenly believed the victim was fully capable of making a gift and the gift was genuine, his would have no *mens rea* for theft. Whether there was valid gift is not relevant to the issue of appropriation,<sup>96</sup> but it is relevant to the determination of dishonesty. The defendant's genuine belief in valid consent could negative his *mens rea* and might also make his conduct objectively honest depending on the facts. It might be honest when there was no fraud, coercion or undue influence and the friendship underlying the gift was genuine friendship and so on.

Barton would like to have had the jury believe that at best he accepted genuine gifts from elderly vulnerable residents in his care, even though he intentionally pursued those gifts. It is doubtful that a jury would accept that Barton made a genuine mistake about the civil law or of a relevant fact, as Barton knew the victims transferred their wealth to him as a result of his undue influence and abuse of trust. Therefore, the jury would work from the premise that there was no mistaken consent and therefore the only consideration was whether his conduct was objectively honest when measured against community standards. In *R v Barton* the Court of Appeal held:<sup>97</sup>

The prosecution case did not depend upon the contention that the residents were not capable of entering into lawful transactions. Rather, it was the prosecution case that the appellants knew that the residents were vulnerable and dishonestly exploited that vulnerability to persuade them to transfer money and gifts to David Barton and his company. This amounted to the offence of conspiracy to defraud, notwithstanding that the residents had legal capacity to make gifts and enter into transactions.

The Court of Appeal rightly held that the trial judge had directed the jury correctly on the issue of capacity.<sup>98</sup> The facts were sufficiently strong to leave mistaken consent or mistaken genuine gift aside and focus on the objective honesty of the transactions. Is it objectively honest to use unconscionable conduct to alienate elderly residents from their family, friends and former legal and financial advisers so as to acquire their wealth? Would a reasonable person believe these elderly people, without being unduly influenced, wanted to transfer all their wealth to a man they had only met a few months before? Would a reasonable person believe that the victims wanted to purchase Rolls Royce motorcars at four times their market value? Is it objectively honest to charge £25,000 per day for Mr Willey's drives out? The answer is clearly no.

## Conclusion

In *R v Barton*, the Court of Appeal followed the decision of the Supreme Court in *Ivey*. It mentioned the decision in *Hinks* but did not delve into the issue of mistaken consent or whether genuine consent might provide a defence. This perhaps is understandable given there was no evidence to support the claim that the properties were transferred as genuine gifts. What we are left with are (1) the mistake of fact or civil law doctrine exculpates if such mistake is genuinely held by the defendant; and (2) the dishonesty doctrine exculpates only if the defendant's conduct is objectively honest according to community

95. *In re Beaney, Decd* [1978] 1 WLR 770; *Williams v Williams* [2003] EWHC 742(Ch).

96. It is still a contentious issue whether the *actus reus* of theft should include 'without consent', but this is not the concern of this article. For criticisms of the *Gomez* and *Hinks* tests for appropriation, see Griffiths (n 8) 264–65; Leggett (n 84) 46; N Tamblyn, 'Reforming Theft: Taking without Consent' (2020) 7 Crim L R 597.

97. Barton (n 6) [131].

98. For an account of weakened wills, see F Jackson, 'Weakness of Will' (1984) 93(369) *Mind* 1, 4. 'It is obvious what the required sense of "undue" influence is: it is influence that leads agents to intentionally act contrary to their better judgement.' But, on the contrary, it seems that causing agents to act contrary to better judgement is neither necessary nor sufficient for weak-willed action.

standards. The claim of right defence adopts a subjective test for mistakes of civil law and of fact, while the dishonesty element adopts an objective test for mistakes about what is honest; this is because the former denies *mens rea* elements of crimes, but the latter is one of the elements of crimes such as theft.

*R v Barton* has brought clarity to the law following the *obiter dicta* statements made concerning dishonesty in *Ivey*. This objective test of dishonesty does not affect the general part doctrine of mistake, which does the lion's share of the work for exculpating those who do not warrant being convicted of theft. The objective dishonesty test does far less and really only comes into play when there is no subjective mistake in a claim of right based on either a mistake of fact or civil law. The decision in *Barton* is hard to fault in terms of substantive doctrine, and it accords with the test proposed in the report of the Criminal Law Revision Committee.<sup>99</sup> Leading academics past and present have also rejected the subjective prong of the *Ghosh* test.<sup>100</sup> Those proposals themselves were cemented into doctrine<sup>101</sup> before the law took a wrong turn in *Ghosh*. It is submitted that a fully objective dishonesty test is sounder law than the two-prong test laid down in *Ghosh*.

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99. Criminal Law Revision Committee (n 35).

100. Williams (n 32) 661–63; Horder (n 43) 403–404; Baker (n 55) 1329–41.

101. *Greenstein* (n 52); *Feely* (n 35).