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Criminalisation and the Duty of Co-operation

Few people are against moves towards participatory democracy as an end in itself: the promotion of (to cite a recent European Report) the, 'extent to which [European] citizens believe that political decision-making can be influenced through their own actions'.¹ We already live, though, in a different - and less agreeable - form of participatory state; and English criminal law plays an important role in creating and sustaining it. We live in a state that can be called the 'bureaucratic-participatory' state.

In the bureaucratic-participatory state, the relevant measurement

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¹ John Gaventa, *Participation, Poverty and Social Exclusion in the North and South* (Brighton: Institute of Development Studies, 1997); *Europeans Engagement in Participatory Democracy* (2013), http://ec.europa.eu/public_opinion/flash/fl_373_en.pdf, accessed 9th April 2015.

of participation, as a means to an end, is the extent to which citizens can be persuaded² or coerced into contributing to better bureaucratic decision-making in the 'public interest'. In the bureaucratic-participatory state, good citizens are not pro-active citizens who themselves try directly to exercise influence by participating in political and social decision-making. From a bureaucratic perspective, that kind of 'amateur' influence would be insufficiently conducive to, say, Pareto efficiency in generating outcomes in regulatory contexts.³ On the contrary, in the bureaucratic-participatory state, political and social decision-making should remain in the hands of a professional and expert executive: in the hands of what Pareto himself describes as (a part of) the 'governing elite'.⁴ Instead, the good citizen of the bureaucratic-participatory state is the co-operative, honest and truthful citizen. The good citizen is to play a role as such a citizen when dealing, amongst other things, with officials whose task it is to secure regulatory goals. For, as Robert Alford puts it (in broadly game-theoretic terms):

² For example, by 'nudges', such as incentives to provide data, on oneself or on others, that may be useful to Government agencies in performing their tasks. On nudging generally, see Karen Yeung, 'Nudge as Fudge' (2012) 74 MLR 122. I will be concentrating on 'shove' rather than on 'nudge', i.e. on criminal or regulatory sanctioning for non-compliance.

³ On achieving Pareto efficiency, see Joseph Stiglitz, 'Regulation and Failure', in David Moss and John Cisternino (eds), *New Perspectives on Regulation* (The Tobin Project, 2009), at 18.

⁴ Vilfredo Pareto, *Treatise on General Sociology* [1915-19] (Dover Publications, 1963), at 1423-24. See, further, the discussion of the utopian vision of the 'elite' paradigm, in Robert R Alford, 'Paradigms of Relations Between the State and Society', in John A Hall, *The State: Critical Concepts*, vol 1 (Routledge, 1994) 63-78.

the elites...that dominate society are responsible and far-sighted enough to realise that they must co-ordinate their activities with others [such as citizens]...because they realise that they are dependent upon each other in the long run.⁵

In seeking to achieve such co-ordination, the criminal law may play an important role. The bureaucratic-participatory state may be content merely to nudge (persuade) people, rather than to coerce them, into feeding views and opinions into its decision-making.⁶ However, the bureaucratic-participatory state is prepared to shove (coerce) people when it comes to the provision, not of opinion, but of *information* or analogous forms of co-operation deemed necessary to the state's decision-making. My focus is on that kind of coercion.⁷

Here is an old example where a court gave its backing to such a bureaucratic strategy. In *Stevens v Steeds Ltd*,⁸ D was charged, under Regulation 42 of Rationing Order No. 1856 (SR & O 1939), with knowingly or recklessly making a false statement, 'for the purposes of

⁵ Alford, n 4, 66.

⁶ On 'nudge' terminology, see n 2.

⁷ Even if coercion is not necessarily the darkest side to the bureaucratic participatory state. The darkest side is that which involves involuntary participation by the citizen: the gathering of information through processes that by-pass both the consent and the knowledge of the citizen, as in the case of covert surveillance and meta-data gathering by the state, not only on national security matters but also for, for example, tax-gathering purposes. See Ian Brown, 'Government Access to Private Sector Data in the United Kingdom' (2012) 2 International Data Privacy Law 230.

⁸ [1943] 1 All ER 314.

obtaining any rationed food'. In holding that the offence was committed as soon as the false statement was knowingly or recklessly made, Lord Caldecote laid emphasis on:

[the] obvious importance to the food department to have accurate returns for the purpose of distributing available supplies and of estimating the supplies that will be required in the future.⁹

Early twentieth century penal interventionism, manifested by offences of this kind, was not solely driven by the war effort,¹⁰ but our concerns are with the modern bureaucratic-participatory state. In more recent times, we find the Department for Work and Pensions taking a similar approach:

The Department for Work and Pensions is committed to the prevention, detection, correction, investigation and, where appropriate, prosecution of fraudulent benefit claims. The aim is to prevent criminal offences occurring by making it clear to our

⁹ [1943] 1 All ER 314.

¹⁰ See e.g. the offences relating to the provision of false information under the Sugar Industry (Reorganisation) Act 1936, the Cotton Spinning Industry (Reorganisation) Act 1936, and the Coal Industry (Nationalisation) Act 1946, briefly discussed in JWC Turner (ed) *Kenny's Outlines of Criminal Law*, 16th ed (Cambridge University Press, 1952), 352.

customers that they have a responsibility to provide accurate and timely information about their claims.¹¹

In the pursuit of this strategy, we should note the form of law that is the main instrument of the bureaucratic-participatory state. This is the 'bureaucratic-administrative' form of law. The bureaucratic-administrative form of law stands for the view that the interests of individuals are subordinate to common or public interests. In pursuing the public interest, this form of law places considerable emphasis on, 'the universality of rules and the precise definition of terms, [and on]... the concepts of intra and ultra vires', because these values contribute to efficiency and predictability.¹² Even so, in some instances, the bureaucratic-administrative form of law may also favour open-textured rules, or the use of discretion by officials. The latter techniques of regulation will be preferred, if they are more likely to further the public interest than spelling out individuals' rights and obligations with precision.¹³

¹¹ DWP, *Sanction Policy: In Respect of Fraudulent Social Security Benefit Claims* (April 2010), paras 2.1-2.2.

¹² Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond Bourgeois Individualism; the Contemporary Crisis in Law and Legal Ideology', in Eugene Kamenka and RS Neale, *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975), 139.

¹³ The tensions between these two bureaucratic-administrative policies were at the heart of the decision in *Reilly and Wilson v The Secretary of State for Work and Pensions* [2013] EWCA Civ 66, where regulations made under the Jobseekers Act 1995 were struck down as too vague.

In the field of criminal law, the bureaucratic-administrative form of law is associated primarily with the use of coercion to underpin state regulation, and is symbolised by the strict liability offence.¹⁴ The overriding commitment of the bureaucratic-administrative form of law to promoting the public interest means that its focus is most commonly not the question, 'Who is to blame?,' for imperilling or damaging the public interest. Instead, the key question is, 'Who should be incentivised (as by a coercive threat), and in what way, most effectively to reduce the risk of damage to – or to promote - the public interest? According to Kamenka and Tay, with this form of law:

its fundamental concern is with consequences rather than with fault or mens rea, with public need or public interest...rather than private rights and individual duties. Bureaucratic-administrative regulation, as Pashukanis saw, elevates the socio-technical norm against the private right of *Gesellschaft* and the traditions and organic living together of the *Gemeinschaft*.¹⁵

A well-known illustration is the obligation on those doing business in the regulated sector to make a 'suspicious activity report' ('SAR'),

¹⁴ Although in practice regulatory offences inspired by this form of law are very varied. For example, a fault-based offence may be placed at the top of a hierarchy of sanctions, for the worst or most persistent offenders. See, generally, Law Commission, *Criminal Liability in Regulatory Contexts* (CP No 195, 2010).

¹⁵ N 12, 140. We will come on shortly to the role of the '*Gemeinschaft*' and '*Gesellschaft*' forms of law in the definition of criminal offences.

under section 330 of the Proceeds of Crime Act 2002. This obligation arises when, in the course of someone's regulated business, information comes to them that another person may have been laundering money. In such circumstances, section 330 of the 2002 Act makes it an offence not to report the suspicion to the relevant authority as soon as is practicable.¹⁶ One might suppose that breach of such a reporting obligation would not be punishable, especially by a sentence of imprisonment, unless something had alerted the defendant to the possibility that a person with whom they were dealing might be laundering money. The primary concern, though, of bureaucratic-administrative law is with maximizing the effectiveness of incentives, rather than with individual blame. Accordingly, criminal liability arises under section 330 not only when the defendant was suspicious (or, of course, actually in the know), but also when there were *reasonable grounds* for the defendant to suspect or know that the other person was engaged in money laundering. The main interest of the legislation is thus 'diachronic.' The main interest is the establishment of an ongoing (unpaid) duty on businesses handling money not to miss an opportunity to 'blow the whistle' on possible money launderers. This is considered

¹⁶ The offence is punishable at trial on indictment by a sentence of up to 5 years' imprisonment. Over 350,000 SARs are made every year: National Crime Agency, <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/ukfiu>, accessed 9th April 2015.

to be the best means over time effectively to promote the public interest in an economy fuelled by clean money.¹⁷ The synchronic interest in identifying blameworthy wrongdoers in particular cases is very much a secondary concern.

We have come a long way, in developing the bureaucratic state, since AJP Taylor expressed the view (surely, even then a considerable simplification?) that, 'until August 1914 a sensible, law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman'.¹⁸ I will be discussing some further examples of obligations to be co-operative by being honest, truthful or helpful: obligations imposed by the state in the interests of furthering bureaucratic-administrative goals, and backed by criminal or regulatory sanctions.

Fault and the Obligation to Assist the Authorities

My thesis will be a relatively modest one. I will leave until the conclusion the large question of whether more use of nudging (providing incentives to act or dis-incentives not to act) rather than shoving (threatening sanctions for action or failure to act) would in some

¹⁷ Peter Sproat, 'An Evaluation of the UK's Anti-Money Laundering and Asset Recovery Regime' (2007) 47 *Criminal Law and Social Change* 169.

¹⁸ AJP Taylor, *England 1914-1945* (Clarendon Press, 1965), 1.

contexts make for a more proportionate response to failures by citizens to provide information or co-operation required by state officials. I will not be concerned at all with whether society should scale back its regulatory ambitions, or with whether it should seek to achieve those ambitions with more or less by way of input from citizens, businesses and other agencies. I will concentrate on how to define criminal offences used to coerce people into providing information. My particular focus will be the way that people should be judged when they have failed to provide the right information, as required. I will use as a basic setting for this focus, Scholmit Wallerstein's helpful distinction between two kinds of obligation to help the authorities: direct and indirect.¹⁹

My concern will be with direct obligations of assistance. Such obligations come in the form of the duty oneself to provide (correct) information, and to answer questions truthfully and honestly, when faced with official demands. Direct assistance obligations of this kind should be contrasted with indirect obligations of assistance. Indirect obligations to help principally involve a duty to co-operate by not obstructing law enforcement authorities, when the authorities are themselves engaged in a search, exercising a judgement on the basis of

¹⁹ Scholmit Wallerstein, 'On the Legitimacy of Imposing Direct and Indirect Obligations to Disclose Information on Non-Suspects', in GR Sullivan and Ian Dennis, *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing, 2012), 38-58, at 50-51.

observation, conducting an inspection, or the like.²⁰ What will be my case, so far as alleged breaches of direct assistance obligations under regulatory law are concerned? My case will be that there is a need for greater formal protection of the accused ('D') from conviction when D has failed to provide the right information, protection going beyond that which is provided by following requirements of fairness and due process prior to trial. Central to my case will be the importance of providing a formal 'reasonable excuse' or absence of dishonesty defence, as an excusing condition applicable to such offences.²¹

As we will see, this role for a dishonesty requirement will involve it operating more like a reasonable excuse defence. It will hence have a broader role than the one it plays under the Theft Act 1968 (the '1968 Act'). For example, I will argue that a failure to provide the right information might not be regarded as dishonest – or might be subject to a reasonable excuse defence – if D had severe difficulty in providing the right information, or if D could not for some other compelling reason reasonably be expected to provide it as required. In that regard, I will

²⁰ Wallerstein, n 19.

²¹ My main focus will be on dishonesty, rather than on 'reasonable excuse', even though the latter may be an acceptable alternative. This is because so much of the law I discuss employs dishonesty (if it employs any fault or excuse element at all) rather than 'reasonable excuse'. Developing my thesis in terms of a dishonesty 'excuse' helps to link the discussion to the analysis of theft that is to follow. However, not much ultimately hangs on the use of that term. As under section 330 of the Proceeds of Crime Act 2002, a defence of 'reasonable excuse' does broadly the same kind of work, even though the burden may be on the accused respecting the latter.

concentrate on direct obligations imposed on benefit claimants to provide accurate financial information.²² Putting aside cases of fraud contrary to the Fraud Act 2006, benefit claimants may fail to provide the right information about their claims, and then find themselves charged with an offence, or facing a penalty, bearing on that failure.²³ I shall argue that when that happens, the case for an excuse such as lack of dishonesty or the presence of reasonable excuse is morally far more compelling than it is when (say) taxpayers face analogous offences or penalties. That is because the need for a dishonesty or reasonable excuse provision can be made to depend on the status (for example, economic or social) of the person under the obligation.

Every criminal lawyer is familiar with the demand that there should be no criminal liability without proof of fault (*actus non facit reum nisi mens sit rea*). That demand may sometimes go too far, and sometimes not far enough, in regulatory contexts. 'Bureaucratic' criminal offences – as a dimension integral to the regulatory schemes of which they form a part – promote the public interest by incentivising particular groups (road users, farmers, gun owners, tax payers, benefit claimants, and so

²² For a broader examination, see Dee Cook, *Rich Law, Poor Law: Different Responses to Tax and Supplementary Benefit Fraud* (Open University Press, 1989). I am very grateful to Niki Lacey for this reference.

²³ I shall not be considering the relevance of the offence of fraud here, because in some circumstances, a benefit fraud could be far more serious than a tax fraud, and there is no reason that the definition of fraud should differ as between benefit fraud and tax fraud.

on) to plan and behave in certain ways. As people seek to negotiate their way through the regulatory 'space,' given the specialised focus of many regulatory regimes on particular groups, it is permissible – and may be morally required - to define the offences that support those regimes in such a way that the offences reflect special characteristics and circumstances affecting members of the group. Such an approach may licence the legislature to dispense with a fault requirement; or, contrariwise, it may demand that the legislature use particular kinds of fault elements, not just any fault element. I shall argue that, for a variety of social, economic and personal reasons, the burden of coping with a strict liability regime is disproportionately harsh on those living on benefits. Furthermore, in this context, we will see that such harshness is not sufficiently mitigated by an insistence on proof of just *any* fault requirement, even a requirement of knowledge that (say) a financial statement is or may be false at the time it is made.

Dishonesty: Justification and Excuse

In what follows, as I have indicated, I will be concerned with the more developed jurisprudence concerning 'dishonesty', rather than with the less well-developed analysis of 'reasonable excuse', as a fault or defence element. The role of dishonesty is best known in the definition of theft

under the Theft Act 1968.²⁴ Under section 1 of the 1968 Act, proof that theft has been committed requires proof that someone dishonestly appropriated property belonging to another, with an intention to deprive the other permanently of the property. What is the role of dishonesty under section 1? It is common to describe the element of dishonesty in theft as a fault or *mens rea* element, but that conceals a complexity about the relationship between the conduct and fault elements of theft.

The requirement of dishonesty makes theft what John Gardner calls a, 'fault-anticipating' offence. This is an offence where the circumstances of justification or excuse are by and large captured by the fault element.²⁵ A crime that is committed only if the relevant elements are engaged in or brought about 'intentionally' is not fault-anticipating. Quite obviously, the plain fact that something was intentionally done in itself tells us nothing about what justification or excuse, if any is needed, there was for doing it.²⁶ By contrast, if an act was done 'dishonestly' then that tells us something about more the defendant's fault (as in the case of a finding that an act was done 'recklessly'²⁷). It tells us that the

²⁴ Theft Act 1968, s 1.

²⁵ John Gardner, 'Wrongs and Faults', in AP Simester, *Appraising Strict Liability* (Oxford University Press, 2005) 51, at 67-70. See also, Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004), 48-50.

²⁶ For the view that almost any action (even something as commonplace as eating a meal in a restaurant) may, in some circumstances, call for justification, see Samuel Sheffler, *Human Morality* (Oxford University Press, 1994), ch 1.

²⁷ See Alan Norrie, 'Subjectivism, Objectivism and the Limits of Criminal Recklessness' [1992] 12 OJLS 45.

act was in some sense unjustified, and lacked adequate excuse. To go into a restaurant and eat a meal like any normal diner is to appropriate property belonging to another, with the intention of permanently depriving the other of it.²⁸ However, the act is not dishonest, and hence not theft of the meal, because there is a perfectly sound justification for doing as the diner does: the diner accepts the restaurateur's invitation to do exactly as he or she does, in eating the meal. Had the diner eaten the meal with no intention of paying at the end as expected, then the diner would have been dishonest when appropriating the meal. In such a case, dishonestly is playing a normative, inculpatory role. It is defining the wrong itself - what ought not to have been done - and is not just determining whether or not someone was to blame for something wrongly done.²⁹

A similar line of reasoning applies in excuse cases. Suppose that I mistakenly think that you have eaten your fill at your birthday party, and so I consume the remains of the delicious slice of cake that you had intentionally put aside for yourself. I do not act dishonestly in appropriating your cake with the intention of permanent deprivation. My act – albeit unjustified - is excusable, given my genuine mistake about

²⁸ This analysis follows from the decision in *DPP v Gomez* [1993] AC 442 (HL).

²⁹ See W Chan and AP Simester, 'Four Functions of *Mens Rea*' (2011) 70 CLJ 381.

your intentions.³⁰ Note, though, that my excuse claim has a justificatory element to it; but this is not a justification for the act itself (I know that my act of cake-eating was unjustified). Instead, it is an agent-perspectival justification. Given the facts as I believed them to be, I *thought* I was justified in doing as I did.³¹ Such a factual, 'claim of right' basis for denying dishonesty, when it includes for this purpose facts about the law, is partially acknowledged in section 2 of the 1968 Act. Section 2 stipulates that D is not to be regarded as dishonest, 'if [D] appropriates the property in the belief that he has in law the right to deprive the other of it...'.³²

The agent-perspectival justificatory dimension to excuse is not limited to beliefs about facts. It may extend to beliefs about morality, aggregate welfare, or any other values that provide a basis for justifying action agent-perspectively.³² Following the Court of Appeal's decision in *R v Ghosh*,³³ it is open to the trial court to find that a defendant is not dishonest on one of two grounds: either, (a) their conduct was, in the circumstances, not dishonest, judged by the standards of ordinary

³⁰ Hence, in this example, by way of contrast with the last, dishonesty is playing an ascriptive role, to do with blame. See Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004), 48-50. If, in this example, I believed that you would have consented to my eating the cake, had you known of the circumstances, then my lack-of-dishonesty claim is directly covered by section 2(1)(b) of the 1968. Section 2(1)(b) in the text following n. 47.

³¹ See Jeremy Horder, n. 28. John Gardner, 'Justifications and Reasons', in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007), ch 5.

³² Jeremy Horder, n 28.

³³ *R v Ghosh* [1982] QB 1053.

honest people or (b) even if their conduct was dishonest by such standards, they did not realise this at the time. This definition has been much criticised, and better alternatives proposed,³⁴ but that is not my concern here. The significant point is that the *Ghosh* definition of dishonesty is perfectly capable of accommodating active justificatory claims where the defendant's agent-perspectival justification is value-based, not fact based.³⁵ That being so, the tribunal of fact may take into account a wide range of excusatory factors, in deciding whether someone's conduct was dishonest.

In that regard, we should note that the 1968 Act's own partial definition of dishonesty expressly includes at least one example of a value-based, activity justificatory claim. This example is in section 2(1)(c) of the 1968 Act, which says that D is not to be regarded as dishonest if he or she appropriates property, 'in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.' Commentators discussing this example tend to highlight only the contrast between the purely subjective element in it – D's belief about the circumstances in which the owner might be discoverable by taking certain steps – and the objective requirement

³⁴ See, for example, K Campbell, 'The Test of Dishonesty in *Ghosh*' [1994] 43 CLJ 349.

³⁵ See following paragraph, and text at n 47.

that, on the facts as D believed them to be, D must not have ruled out steps it would in fact be reasonable to take to find the owner.³⁶ Such an analysis overlooks the fact that what makes salient D's belief that *ex hypothesi* reasonable steps will not uncover the owner (D's fact-based, actively justificatory belief) is a further, value-based belief. This is the belief that, in such circumstances, D has a moral claim – a form of reasonable excuse - to treat the property as his or her own (D's value-based, agent-perspectival belief).³⁷

Dishonesty: Beyond the *Gesellschaft* 'Claim of Right'

The breadth of the basis on which dishonesty can be denied – in effect, operating in a fault-anticipating way³⁸ as a limited 'reasonable excuse' defence - has meant that the decision in *Ghosh* has found few friends amongst scholarly commentators.³⁹ Commentators have found particularly objectionable the possibility that D can be found not guilty of theft when he or she seeks to justify the appropriation of another's

³⁶ See, e.g. Simester and Sullivan et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 5th ed (Hart Publishing, 2013), 546-47.

³⁷ One can resist the idea that a value-based belief is the basis here for denying dishonesty, only by performing an analytical conjuring trick. This involves deeming V's property right to be extinguished, as soon as V cannot be discovered by taking 'reasonable' steps. That this is just a trick is demonstrated by the fact that it makes V's *ex ante* rights subject to *ex post facto* negation through an incommensurable and purely consequentialist value-judgment: how much effort would have to be put in to discover V's identity, as compared with the market (and also sentimental?) value of the property?

³⁸ See John Gardner, n 25 above.

³⁹ It is notable, though, that Campbell's critical reformulation of the *Ghosh* test would preserve the right of the fact-finder to acquit D, if the fact-finder was prepared to excuse D's failure to recognise that his or her own behaviour would be regarded as dishonest by the standards of ordinary people: see Campbell, n 34.

property on the basis of the value it has to him or her, as compared with the value to an un-consenting owner.⁴⁰ Along such lines, Simester and Sullivan thunder:

It is vital to the authority of a legal system that its laws set an objective touchstone. Law works by preventing people from doing what they want, through imposing a standard of acceptable behaviour and demanding that they conform to that standard. If the values that the law would have us act upon were displaced, in each case, by those of the particular defendant, then the law would have no standard to impose.⁴¹

I do not want to comment on the appropriateness of this narrow view of dishonesty as it would apply to the 1968 Act. Perhaps, for example, cases like the one in which someone pockets money that they have found in the street are best dealt with as matters for sentence mitigation, rather than forming the basis for a denial of dishonesty and hence a denial that the offence was committed. Nonetheless, we should note the narrow, 'neo-Hegelian' roots of the wish to treat only fact-

⁴⁰ See Edward Griew, 'Dishonesty: The Objections to Feely and Ghosh' [1985] Crim LR 341.

⁴¹ AP Simester and GR Sullivan et al, n 36, 549. The authors regard as preferable a test for dishonesty that is actively justificatory only in relation to the facts (including legal facts), a test that excludes agent-perspectival justifications when they relate to value judgements. An example of such a test is the test under section 217 of the Crimes (New Zealand) Act 1961. For a broadly similar suggestion, see Andrew Halpin, 'The Test for Dishonesty' [1996] Crim LR 283.

based, actively justificatory beliefs as having an excusatory character in crimes of dishonesty. On a Hegelian account of fault, excuses should be provided in law only where, as Alan Brudner puts it, 'the accused, through lack of fault, meant no challenge to the intersubjective basis of right'.⁴² What that means is that Ds can be excused when they mistake the relevant facts, in taking another's property with an intention of permanent deprivation; but Ds should on no account be excused where they considered that they had a better *moral* claim to the property.

The narrowness of the neo-Hegelian perspective is linked to its limited, '*Gesellschaft*' account of the forms and limits of law.⁴³ Amongst other things, that account:

Emphasises...precise legal provisions and definitions and the rationality and predictability of legal administration. It is oriented to the precise definition of the rights and duties of the individual through a sharpening of the point at issue and not the day to day ad hoc maintenance of...community traditions and organic solidarity.⁴⁴

⁴² Alan Brudner, *The Unity of the Common Law* (University of California Press, 1995), 244.

⁴³ The account that follows is drawn from Eugene Kamenka and Alice Erh-Soon Tay, n 12.

⁴⁴ Kamenka and Tay, n 12, at 137.

The ad hoc maintenance of, 'community traditions and organic solidarity' is, of course, characteristic of the contrasting '*Gemeinschaft*' form of law.⁴⁵ Under the *Gemeinschaft* form of law and ideology, there is little if any distinction between, 'the civil wrong and the criminal offence; between politics, justice and administration, between political issues, legal issues and moral issues'.⁴⁶ Under the *Gemeinschaft* form of law:

Justice is...substantive, directed to a particular case in a particular social context and not to the establishment of a general rule or precedent except...when the taboos protecting the social structure are involved.⁴⁷

The *Gemeinschaft* form of law finds expression in section 2(1)(b) of the 1968 Act. Section 2(1)(b) says that D is not to be found dishonest if he appropriates property, 'in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it'. Suppose D, knowing that his neighbour has gone on holiday for two weeks, sees that milk is still being delivered to the neighbour's door. D consumes the milk, thinking that, because they are friendly neighbours,

⁴⁵ In this context, '*Gesellschaft*' can be translated as a formally incorporated company, whilst '*Gemeinschaft*' can be translated as a non-incorporated community, collective or fellowship.

⁴⁶ Kamenka and Tay, n 12, at 136.

⁴⁷ Kamenka and Tay, n 12, at 136.

the neighbour would have consented, had he or she known of the appropriation and of its circumstances. In such a case, D can rely directly on section 2(1)(b), without having to fall back on the *Ghosh* definition of dishonesty. The significance of section 2(1)(b) is that D's claim to acquittal involves neither an appeal to nor, nor a challenge to, what Brudner calls, 'the intersubjective basis of right'. That is because D's claim is not a rights-focused denial of dishonesty. Instead, it is an appeal to a common understanding or social convention: something that the owner, as a fellow member of the moral community, should acknowledge. This understanding or convention concerns the potential for some *ex hypothesi* non-consensual takings to involve a substantive justice that the law can leave open to recognition by the tribunal of fact. These understandings and conventions transcend the *Gesellschaft*-inspired language and practice of rights. They involve no crude opposition between V's actual 'right' and D's 'claim of right'.

Section 2(1)(b) of the 1968 Act is a manifestation of a wider point about the dishonesty requirement. The dishonesty requirement has largely resisted attempts by orthodox theorists to cabin it within a *Gesellschaft* structure for understanding excuses. Instead, more consistent with a *Gemeinschaft* understanding of law, the dishonesty

requirement remains fully compatible with an *ad hoc*, case-by-case approach in which, in the hands of the tribunal of fact, securing trial fairness through the application of community values plays a significant role *alongside* respect for defendants with fact-based, actively justificatory claims of right. The former is, if you will, the criminal law's communitarian *yin* to its Hegelian *yang*. The threat to what Simester and Sullivan refer to as, 'the authority of a legal system'⁴⁸ involved in this broad understanding of dishonesty is in fact very limited.⁴⁹

Simester and Sullivan complain that the inherent uncertainty of the *Ghosh* test means that we cannot decide whether, for example, releasing battery hens from captivity for ethical reasons is always theft, because we cannot say whether such a practice offends against the standards of ordinary, honest people. They continue:

Obviously, if different persons can reasonably hold different views about...[such] questions, there is a real danger of different verdicts, on the same set of facts, from different juries. In turn, this undermines the rule of law.⁵⁰

⁴⁸ See text at n 41.

⁴⁹ For discussion of excuses and the authority of law, see Jeremy Horder, n 28.

⁵⁰ Simester and Sullivan, n 36, 549.

This critique overlooks two points. First, if dishonesty is a concealed excuse for a harmful wrongdoing (as argued earlier), then – like, say, the defences of reasonable excuse, or duress - it is arguably not subject to the same demands of certainty and predictability in its definition as the conduct rules whose definitive application it qualifies.⁵¹ Secondly, Simester and Sullivan’s critique airbrushes from the picture the strongly *Gemeinschaft* strain of thought and practice that may come to the fore in trials where the dishonesty requirement has been put in issue, a requirement that permits a more open-ended, evaluative pursuit of justice on a case by case basis.

Excusing Conditions and the Forms of Law

When it comes to excusing conditions (or defences more broadly), there will inevitably be tensions between the demands of the different forms of law. As I have said, the bureaucratic-administrative form of law – like the *Gesellschaft* form of law - may value clarity and predictability about the circumstances of excuse (or of any defence, whether or not excusatory). A classic example of that preference in action is to be found in the precisely circumscribed and highly detailed defences, under section 444 of the Education Act 1996, to the offence of failing to ensure

⁵¹ On the significance of the status of a rule as a ‘conduct’ rule, see Meir Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’ (1984) 97 Harvard LR 625.

that a child attends regularly at school. But there ends the common ground on defences between the two forms of law. If and when there is a need for a more open-ended approach to defences, the bureaucratic-administrative form of law will favour an approach under which officials *control* the circumstances of excuse, so that public (diachronic) interests are not threatened by (synchronic) concerns about individual culpability. Such an approach would, of course, be anathema to the rights-based *gesellschaft* form of law.

In this, the bureaucratic-administrative form of law shares something in its approach with the *Gemeinschaft* form of law. On the one hand, the latter, unlike the former, is concerned more with securing individual justice in particular cases in context than with the establishment of general rules. On the other hand, under the *Gemeinschaft* form of law, the maintenance of community tradition and solidarity – one form of common interest - is always liable to take preference over the untrammelled assertion of individual rights. In consequence, for some defendants, the *Gemeinschaft* form and ideology of law poses a threat when they claim excuse. That is because the authoritative 'community tradition' within this form of law, what gives people a sense of being bound together, may turn out to be

constituted by deep-seated prejudices against certain kinds of excuse-seeking defendant. This means that such a defendant - say, a benefit claimant - may find him or herself in the awkward position of having to square a morally sound claim to excuse with a recognition that, as a member of the community, he or she is obliged to frame a defence narrative in such a way that it adequately accommodates the community's predisposition to regard him or her as one of the supposedly 'idle, undeserving poor'.⁵²

Whatever its broader limitations as a model for law and politics, I suggest that it is only under the *Gesellschaft* form and ideology of law - with its emphasis on individual rights - that someone will confidently be able to make an unambiguous assertion of entitlement to excuse. For, only the *Gesellschaft* form of law is *fully* at ease with the 'republican' model of citizenship, in which, when seeking to establish a defence, citizens:

Do not have to bow or scrape, toady or kowtow, fawn or flatter; they do not have to placate any others with beguiling smiles or mincing steps. In short they do not have to live on their wits, whether out of fear or deference...[By contrast, they can]...walk tall among [their]

⁵² See the analysis of such attitudes in Dee Cook, n. 22, 18 & ch 2.

fellows, conscious of sharing in the general recognition that no one can push [them] around with an expectation of impunity.⁵³

This language might appear to be language more appropriate for justification than for excuse; but claims of lack of dishonesty or of reasonable excuse tend to blur such categories, and I will not be further concerned with these categories here.⁵⁴ In the bureaucratic-participatory state, what is needed properly to acknowledge excuses (or justifications) for information-provision failures is a structure that marries this republican ideal, with a *Gemeinschaft* emphasis on the importance of doing justice in its context on a case by case basis. As I have indicated, I will use benefit offences as a proving ground for this approach in English law.

'Domination' and the use of coercion to acquire information

A failure to provide information can be a straightforward instance of harmful wrongdoing, or of the direct posing of a threat of such wrongdoing. For example, I may be liable to conviction for fraud if, owing you a legal duty of disclosure, I dishonestly intend cause you loss, to put your finances at risk, or to make a gain myself, by failing to

⁵³ Philip Petit, 'Criminalisation in Republican Theory', in RA Duff et al. (eds), *Criminalisation: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 132, 138.

⁵⁴ See further, Jeremy Horder, n. 28, 7.

reveal certain information to you.⁵⁵ However, a failure to provide information may be prohibited in cases beyond those in which wrongful harm has in fact been done, or where there is a more or a less direct threat of wrongful harm. Such a failure may be prohibited even when the failure of one individual to provide the information in question may involve only insignificant – or no - wrongful harming, or a threat thereof. Such a failure may be prohibited when, if too many individuals fail to provide that information, this will cause or threaten significant harm through diminution of what regulation theorists call a 'common pool' resource.⁵⁶ The 'tax take', or the total sum available to be paid in benefits, are examples of common pool resources. The significance of common pool resources is that, whilst each individual who takes too much benefit or pays too little tax may make an almost wholly insignificant, *de minimis* inroad on a vast common pool, if too many people behaved in that way, the common pool would be unacceptably diminished.⁵⁷ Hence, in such circumstances, it is justifiable to prohibit any act that diminishes the common pool, other than in accordance with the scheme authoritatively laid down to govern its diminution.

⁵⁵ Fraud Act 2006, s 3.

⁵⁶ On 'common pool' resources, see Karen Yeung, 'Can We Employ Design-Based Regulation While Avoiding the Brave New World?' (2011) 3 Law, Innovation and Technology 1.

⁵⁷ A point noted by Aristotle, *The Politics*, BK 11, Part 3, <http://classics.mit.edu/Aristotle/politics.2.two.html>, accessed 9th April 2015.

We should assume that there can be distributive justice-based duties, generated by a common pool resource situation, sufficiently important to warrant the threat of criminalisation for breaches of those duties. A significant question now arises, in relation to the two common pool resources I have mentioned: the tax take, and the benefit pool. Should the approach to criminalisation of a breach of these duties be the same in each case, the case of a failure to provide information relevant to a tax return, and the case of a failure to provide information relevant to a benefit claim? My tentative answer is 'no'. Cases of failure to provide information relevant to a benefit claim should be criminalised only when they are dishonest, whereas – in general terms – criminalisation of failures to provide information relevant to a tax return may be a legitimate course of action even when the failures are not dishonest.⁵⁸

Most income earners - those who pay tax on income sufficient to live on - enjoy, in virtue of that status, a basis for what I will call 'non-dependent engagement' with society. Non-dependent engagement with society is engagement that is not subject to 'domination' in key respects, such as in relation to entitlement to an income. In that regard,

⁵⁸ I say, 'in general terms', because liability to pay tax is a complex matter, and some benefits payable to the unemployed are taxable, such as jobseekers' allowance: www.hmrc.gov.uk/manuals/eimanual/EIM76220.htm, accessed 9th April 2015. In referring to failures to provide the right information, I mean to include cases involving provision of the wrong information.

domination bears something like its republican meaning: direct discretionary (state) control over key aspects of people's lives.⁵⁹ Those earning enough to be taxpayers enjoy the benefits of non-dependent engagement with society (whether or not as citizens). They are not subject to state domination, in relation to their entitlement to an income, their entitlement being governed by contractual rights and duties even when the employer is the state. To that extent at least, they are autonomous. By contrast, those who are substantially reliant on benefits experience 'dependence engagement' with society. Someone's engagement with society is dependent if it is subject to significant domination. Such a person is directly subject to the discretion of the state, and dependent on the state when it comes to the possibility of enjoying an autonomous life. This happens to benefit claimants when it is wholly within the state's gift to set levels of benefit, wholly for the state to decide if benefits should be withdrawn or reduced, and so on. I will assume, without further argument, that the state has a special duty of care to those wholly or substantially dependent on it financially for

⁵⁹ Philip Pettit describes domination as meaning that, 'the dominating party [here, the state] can interfere on an arbitrary basis with the choices of the dominated: can interfere, in particular, on the basis of an interest or an opinion that need not be shared by the person affected. The dominating party can practice interference, then, at will and with impunity: they do not have to seek anyone's leave and they do not have to incur any scrutiny or penalty...[Domination involves]...exposure to another's power of uncontrolled influence': Phillip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), at 22 & 28. I have something rather narrower in mind here, although certainly something along these lines.

the possibility of living an autonomous life. As David Donnison puts it, this duty arises because, amongst other things:

To keep people out of poverty, people must have an income which enables them to participate in the life of the community...[T]hey must be able to live in a way which ensures, so far as possible, that public officials, doctors, teachers, landlords and others treat them with the courtesy due to every member of the community.⁶⁰

For someone in a position of dependent engagement, far more will normally be at stake if they are convicted of an offence relating to their benefit claim, by way of contrast with a taxpayer who commits an analogous offence in relation to their liability to pay tax.⁶¹ This is so, even though in theory both such people may wrongfully risk to the same extent an excessive diminution of the common pool of resources in question. The plain fact is that, as Steve Uglow observes:

The welfare claimant...has few defences since all the circumstances of his life may be under public scrutiny. The

⁶⁰ David Donnison, *The Politics of Poverty* (Martin Robertson, 1982), 8.

⁶¹ This is a general claim, and subject to exceptions. For example, someone making a statement relevant to a taxable claim for a jobseeker's allowance might need to be treated in the same way as someone making such a statement in relation to non-taxable income support.

claimant may also carry a “moral taint” as a person unable to earn a living.⁶²

Dependent Engagement and the ‘Ordinary’ Citizen

The conditions under which the false statement which constitutes “fraud” is made are...very different for taxpayers and for...benefit claimants. These conditions reflect differences in power and credibility...benefit claimants do not have the knowledge and power even to record their own histories and circumstances...If [taxpayers’ statements are] later proven false, they often cite innocent error or confusion in justification. These excuses are far more likely to refer to the experience of benefit claimants, yet are usually rejected.⁶³

Let me now bring some practical life to the theory. I will begin with some figures concerning people’s fitness for meaningful engagement in what I earlier called the bureaucratic-participatory state.

The Department for Work and Pensions (the ‘DWP’) lists a large range of factors likely to cause people to struggle to achieve such engagement, from rural isolation, through language difficulties, drink or

⁶² Steve Uglow, ‘Defrauding the Public Purse: Prosecuting in Social Security, Revenue and Excise Cases’ [1984] Crim LR 128; Dee Cook, n. 22, at 2.

⁶³ Dee Cook, n 22, 37.

drug addiction, to forms of disability.⁶⁴ To focus in more detail on some of these groups, some 5.2 million adults in England can be described as, 'functionally illiterate', which is to say they have literacy levels at or below those expected of an eleven-year-old.⁶⁵ Such people are the least likely of all groups to be in full-time employment at the age of thirty.⁶⁶ The problem of illiteracy is particularly marked amongst young people. Literacy problems affect 16 to 24-year-olds in England more than in almost all the other wealthy countries of the world.⁶⁷ These problems contributed significantly to the figure of 1 in 5 young people being unemployed in England.⁶⁸ By contrast, only 2% of families with good levels of literacy live in workless households.⁶⁹ An even more depressing picture can be painted concerning lack of numeracy. Some 15 million adults in England have numeracy skills at or below level 3, the skills expected of an eleven-year-old, and 6.8 million have skills equivalent to (or worse than) a nine-year-old.⁷⁰ 15% of 37-year-olds cannot manage their household accounts because of numeracy problems, with a further 8% saying that they could manage these accounts only, 'with

⁶⁴ DWP, *Universal Credit: Local Support Services Framework* (DWP, 2013), annex C.

⁶⁵ www.literacytrust.org.uk/adult_literacy/illiterate_adults_in_England, accessed 9th April 2015.

⁶⁶ Deeqa Jama and George Dugdale, *Literacy: State of the Nation* (National Literacy Trust, 2012), 5.

⁶⁷ England was ranked 21st out of 24 rich countries: All-Party Parliamentary Literacy Group, *Report of the Youth Literacy and Employability Commission* (National Literacy Trust, 2013), 6.

⁶⁸ www.parliament.uk/briefing-papers/SN05871, accessed 9th April 2015.

⁶⁹ See n. 68.

⁷⁰ Every Child a Chance Trust, *The Long-Term Costs of Numeracy Difficulties* (London: Every Child a Chance Trust, 2009), 7.

difficulty'.⁷¹ Unsurprisingly, poverty exacerbates these problems, with 37% of children who attained below level 3 numeracy skills eligible for free school meals, compared with 17% of all children.⁷²

To an unknown extent, such significant disadvantages may overlap with problems arising from the so-called 'digital divide'. Children from disadvantaged backgrounds are less likely to use the internet than their more privileged peers, and working class children are more likely at 13-years-of-age never to have used the internet in their lives, or to use it infrequently.⁷³ In that, of course, these children join a pre-war generation at the other end of the age scale, brought up before the post-war emergence of a consumer culture, whose disengagement is likely significantly to affect their life chances if it is exacerbated by factors such as social disadvantage.⁷⁴ Recent evidence shows that only a small proportion of benefit claimants use the internet to operate the benefits system,⁷⁵ whereas 84.5% of tax returns are completed online.⁷⁶

⁷¹ N.70.

⁷² N. 70, 8.

⁷³ See S. Livingstone, M Bober and E. Helsper, 'Inequalities and the Digital Divide in Children and Young People's Internet Use: Findings from the UK Go Online Project' (2005) *eprints.lse.ac.uk/398/1/UKCGOdigitaldivide.pdf*, 3-4., accessed 9th April 2015.

⁷⁴ See Gerda Jehoel-Gijsberes and Cok Vrooman, (2008) 'Social Exclusion of the Elderly: A Comparative Study of EU States', ENEPRI Research Report No 57, AIM WP8.1, aei.pitt.edu/9443/2/9443.pdf, accessed 9th April 2015.

⁷⁵ DWP, n. 11, 13.

⁷⁶ <https://www.gov.uk/government/news/hmrc-sees-record-breaking-year-for-tax-returns>, accessed 9th April 2015.

Such people's opportunities for meaningful engagement in society may be limited by the tendency of bureaucratic forms of organisation to use standardised procedures, and top-down methods, that are not well-adapted to such people's needs,⁷⁷ a point highlighted in the much-praised Oakley Review of Jobseekers Allowance sanctions.⁷⁸ More broadly - when at school, unemployed or pensioners - such people are likely also to be dependent, in their engagement with society, in the political sense identified earlier. That is to say, for them, the very possibility of an engaged, autonomous life depends directly on discretionary decisions made by – amongst others - the state's bureaucratic bodies, in relation to (for example) schooling, benefit and basic pension policy. In this context, that is significant. Information provision will inevitably prove crucial, if society's inclusive ends, with regard to providing the conditions for the realisation of people's autonomy, are to be attained by the bureaucratic entities charged with delivering those ends. Someone's limited ability to provide key information accurately, or at all, obviously threatens to frustrate those ends and may further impoverish that person's life.⁷⁹ As the House of

⁷⁷ Gaventa., n 1, 1. By contrast, standardised procedures and top-down methods may actually be more appropriate when dealing with bureaucratic entities, such as firms.

⁷⁸ Matthew Oakley, *Independent review of the operation of Jobseeker's Allowance sanctions validated by the Jobseekers Act 2013* (HMSO, 2014), 9.

⁷⁹ See e.g. Johan P Olsen, 'Maybe It Is Time to Rediscover Bureaucracy' (1996) 16 *Journal of Public Administration Research and Theory* 1. The effects of this are exacerbated by deep-seated prejudice against

Commons Work and Pensions Committee remarks, confronted by an insufficiently sensitive bureaucracy, the most disadvantaged people may find themselves being, 'set up to fail'.⁸⁰

This is the background for my main concern: the penalisation of the failure by people who are dependent, in the sense just outlined, to provide the information required of them by the bureaucratic-participatory state. In particular how, if at all, does the bureaucratic-administrative system of law containing benefit offences and penalties tackle failures to provide information by those at a disadvantage when seeking to provide it? What role, if any, should be played by the provision of a lack of dishonesty or reasonable excuse defence?

No Excuses: the DWP's Iron Fist and State Domination.

Social solidarity involves, amongst other things, the sharing of risks and responsibilities; but with the sharing of risks come risks of sharing.⁸¹ The bureaucratic-participatory state is always likely to place some emphasis on seeking, through punitive means, to address the risks of sharing, as a way of buttressing the acceptability of sharing risks. Kees Schuyt argues

benefit claimants that, ironically, is the manifestation of a toxic new form of *Gemeinschaft*: the binding together of the 'haves' against the 'have nots'; see further, Dee Cook, n. 22, 15-19, and text at n 52.

⁸⁰ House of Commons Work and Pensions Committee, *Benefit Sanctions: Beyond the Oakley Review*, 5th Report of Session 2014-2015, HC 814 (TSO 2015), 28.

⁸¹ See further, Kees Schuyt, 'The Sharing of Risks and the Risks of Sharing: Solidarity and Social Injustice in the Welfare State' (1998) 1 *Ethical Theory and Moral Practice* 297.

that, when the state creates a rule-governed bureaucracy to share risks through benefit provision, one of the risks of such sharing will be the spawning of free riders and what Schuyt calls 'calculative citizens' who make illegitimate use of a bureaucracy's well-intentioned rules.⁸² There will consequently be pressure to change the rules to exclude the former (the free riders), and to deter the latter ('calculative citizens') through the use of appropriate offences. There is in fact scant evidence of significant numbers of 'calculative citizens' defrauding the benefit system.⁸³ Even so, the DWP does not see that as a reason to downplay the importance of the 'risks of sharing' problem:

The...DWP takes benefit fraud very seriously. Although the vast majority of people who claim benefits are honest, those who steal benefits are picking the pockets of law-abiding tax payers. In 2010-11, benefit thieves stole an estimated £1.2 billion from public funds, that's why we are determined to catch them.⁸⁴

Were the DWP concerned solely, as surface appearances suggest, with genuine fraud or theft in relation to benefits (both offences of

⁸² See Schuyt, n 81, who uses the term, 'calculative citizens'. On the history of such thought, see Dee Cook, n 22, ch 2.

⁸³ See Tamara Walsh and Greg Marston, 'Benefit Overpayment, Welfare Fraud and Financial Hardship in Australia' (2010) 17 *Journal of Social Security Law* 100, at 108.

⁸⁴ [Campaigns.dwp.gov.uk/campaigns/benefit-thieves/](http://campaigns.dwp.gov.uk/campaigns/benefit-thieves/), accessed 9th April 2015. See also, Department for Work and Pensions, *Penalties Policy: In Respect of Social Security Fraud and Error* (London: DWP, January 2015), para 2.1.

dishonesty) then perhaps this passage might pass muster, morally speaking. However, the DWP's rhetoric is highly misleading.

In particular, the DWP wrongly sweeps, into the category of what it calls 'benefit theft', offences committed when someone intentionally fails to inform the DWP that they are now living with a partner, that they have undisclosed savings, that their children have left home, that they have started work, that they have inherited money, that they are going abroad, or that they have changed address.⁸⁵ There is no need for proof of dishonesty in relation to all these offences, even though some benefit offences do require such proof.⁸⁶ An example where there is no requirement of dishonesty is the net-widening offence created by section 16(3) of the Social Security Fraud Act 2001:

A person shall be guilty of an offence if—

(a) there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation...

(c) he knows that the change affects an entitlement of his to such a benefit or other payment or advantage; and

⁸⁵ [Campaigns.dwp.gov.uk/campaigns/benefit-thieves.whatis.asp](http://campaigns.dwp.gov.uk/campaigns/benefit-thieves.whatis.asp).

⁸⁶ See, for example, the offences in the Social Security Fraud Act 2001, s 16(2).

(d) he fails to give a prompt notification of that change in the prescribed manner to the prescribed person.⁸⁷

A criminal prosecution under this section is undertaken by the Crown Prosecution Service ('CPS'), which will – as in all cases - apply a test of whether the prosecution is in the 'public interest', alongside the evidential sufficiency test.⁸⁸ One possible result of CPS consideration of the public interest in prosecution may be a decision to refer a case back to the DWP for the application of an administrative penalty for this offence. Such a penalty will be imposed by the DWP, 'where appropriate':⁸⁹

It is current DWP policy to offer these penalties where the case is deemed to be not so serious and the offer of an administrative penalty is considered a suitable alternative to prosecution, and where the gross overpayment is under £2,000. Unlike cautions no admission of guilt is required from the customer before offering an administrative penalty, although there is a statutory requirement

⁸⁷ The aggravated version of this offence in section 16(2) does require proof of dishonesty, but even the lesser offence may end in a sentence of up to three months' imprisonment: See, further,

http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/obtaining_benefit_fraud/, accessed 9th April 2015.

⁸⁸ http://www.cps.gov.uk/legal/v_to_z/welfare_rural_and_health_cases/, accessed 9th April 2015.

⁸⁹ Department for Work and Pensions, *Penalties Policy: In Respect of Social Security Fraud and Error* (DWP, January 2015), para 4.3.5. From 8th May 2012 the administrative penalty increased to 50% of the amount overpaid subject to a minimum of £350 and a maximum of £2,000. The administrative penalty is payable in addition to any recoverable overpayment (para 4.4.2). On the 8th April 2014 the Government announced the intention to increase the maximum administrative penalty to £5,000, with the new limit being introduced in April 2015 subject to Parliamentary approval (para 4.4.3).

for investigators to ensure that there are grounds for instituting criminal proceedings for an offence relating to the overpayment.⁹⁰

This is an important discretionary, mesh-thinning power, since the overwhelming majority of benefit 'fraud' does not involve the kind of dishonesty that might bolster the public interest in criminal prosecution.⁹¹

Whether the proceedings are criminal or administrative, the relevant authorities may withhold benefits themselves as a punishment.⁹² That is a matter of serious concern, because it is unlikely that justice can be done in the most sensitive cases through reliance, by way of fault element, solely on fault concepts such as knowledge, negligence, and the failure to take reasonable steps.⁹³ Offences with these kinds of fault element are liable to operate to the severe disadvantage of those whose prospects for meaningful engagement in society are already limited by illiteracy, innumeracy, unfamiliarity with internet processing of information, or all of these. Such people are quite

⁹⁰ DWP, *Sanction Policy: In respect of fraudulent Social Security Benefit Claims*, Version 4 (DWP, 2010), para 4.3.2.

⁹¹ See Walsh and Marston, n 83, 104. HMRC has similar powers to impose administrative penalties on taxpayers where someone, 'has deliberately or negligently given the wrong information on their claim, or when reporting a change of circumstances or when providing information to HMRC as part of their checks'.

⁹² Social Security Fraud Act 2001, ss 7-11. For details of how the scheme works, see the Welfare Reform Act 2012.

⁹³ See Joseph Rowntree Foundation, *Welfare Sanctions and Conditionality in the UK* (Joseph Rowntree Foundation, 2014).

likely to find themselves in a position where they know that changes in their circumstances affect their benefit entitlement, but they lack the capacity for meaningful engagement that would lead them to give full and timely notice of these changes to the relevant authorities.

Accordingly, in spite of a lack of dishonesty, such people will be exposed to effective exclusion from society, if their benefits are taken away as a punishment for commission of a benefit offence. Regrettably, then, these punitive measures should really be understood less as a means of identifying 'cheats', and more as a means of coercively reinforcing (financial) domination – in the sense described earlier – over those on benefits.⁹⁴

The Velvet Glove: Excuses under Bureaucratic Law

Earlier, I suggested that the bureaucratic-administrative system of law is reconcilable with the provision of open-ended excuses, but it will tend to favour such excuses only where officials – charged with securing the public interest – control the circumstances of excuse or exception. The maintenance of such executive control is, of course, the hallmark of

⁹⁴ The negative externalities created by such domination are clear: the total amount of Income Support and income-related Employment and Support Allowance unclaimed by around half a million people stood, in 2010, at between £0.75 billion and £2.04 billion: <https://www.gov.uk/government/collections/income-related-benefits-estimates-of-take-up--2>, accessed 9th April 2015.

'domination'.⁹⁵ For that reason, this system of law is most comfortable accommodating the conditions of excuse through the use of in-house official discretion to avoid prosecution at all, when those conditions obtain, rather than at the point where sanctions are to be applied. For, it is at the latter stage where the intrusion of rights-based *Gesellschaft* (or ad hoc *Gemeinschaft*) concerns are most likely to threaten the efficient and predictable attainment of policy goals.

An example of executive domination arises when DWP fraud investigators find that, 'a significant mental or physical condition is suspected at any stage of the investigation.' In such cases, the question whether or not to continue with the investigation is simply passed to a senior officer within the DWP.⁹⁶ The answer to the question is not made to hang on, say, an external medical assessment of the individual. Further, in soft law setting out the scheme governing benefit for those with long-term health conditions - the Employment and Support Allowance⁹⁷ - internal guidance has now been given on safeguards to be observed before finding that a claimant had no 'good reason' for breach of an obligation.⁹⁸ The guidance says:

⁹⁵ See text at n 59.

⁹⁶ DWP, *Fraud and Error Penalties and Sanctions: Equality impact assessment* (DWP, 2011), para 14.

⁹⁷ <https://www.gov.uk/employment-support-allowance/overview>, accessed 9th April 2015.

⁹⁸ HC Work and Pensions Committee, n 80, 42.

[...] it is particularly important to consider the welfare of claimants who have mental health conditions or learning disabilities, or conditions affecting communication/cognition, for example, stroke or autistic spectrum disorder.⁹⁹

As in the previous instance, no external judgment necessarily intrudes on the DWP's own processes for dealing with such difficult cases. There are other examples of the preservation of such executive control of excusing conditions. Under the present system governing Jobseekers' Allowance benefits, claimants may seek to avoid sanctions for non-compliance with work obligations if there was a 'good reason' for a failure to meet an obligation.¹⁰⁰ However, 'good reason' is undefined in law (although it is understood to include factors such as illness, family bereavement,¹⁰¹ and mental health conditions or disorders¹⁰²). Moreover, whether a benefit claimant had a good reason is a matter determined by 'a DWP decision-maker' rather than an independent person or body.¹⁰³ Finally, it is also the DWP that will itself reconsider the matter, through a

⁹⁹ DWP, ESA Guidance for Jobcentres, chapter 8 [not published], cited in HC Work and Pensions Committee, n 80, 42.

¹⁰⁰ <https://www.gov.uk/jobseekers-allowance/further-information>, accessed 9th April 2015. See further, HC Work and Pensions Committee, n 80, 12.

¹⁰¹ HC Work and Pensions Committee, n 80, 10.

¹⁰²

http://www.turn2us.org.uk/information_resources/benefits/working_or_looking_for_work/jobseekers_allowance_-_turn2u/jsa_sanctions_-_turn2us.aspx#Good, accessed 9th April 2015. See further HC Work and Pensions Committee, n 80, 12.

¹⁰³ DWP, *Jobseeker's Allowance Sanctions: How to Keep Your Benefit Payment* (DWP, 2014).

Mandatory Reconsideration Notice, if the claimant believes that the initial decision was wrong.¹⁰⁴

In all of these examples, officials must acknowledge – they are morally bound to acknowledge – that either ongoing disadvantage, or simply the special circumstances of a case, may mean that the imposition of a sanction is inappropriate. Yet, in all these examples, in-house officials remain wholly or largely in control of the circumstances of excuse (‘good reason’). This structural dominance of bureaucratic-regulatory ideology has sometimes proved to be nothing less than a shambles, in point of justice. It has been too open to egregious failures: as when, for example, a man had an appointment at the jobcentre on a Tuesday, was taken to hospital with a suspected heart attack that day, missed the appointment, and was sanctioned; or when a man was made subject to sanctions when he missed an appointment in order to be at his partner’s side in hospital, after she had given birth to a stillborn child.¹⁰⁵

¹⁰⁴ N 103. Only if the claimant is not satisfied after the issuing of the Mandatory Reconsideration Notice will there be the possibility of an appeal to an independent tribunal: n 100. It will be a rare and unusual benefit claimant who is willing to take matters that far.

¹⁰⁵ For this, and other instances of very harsh sanctioning, see <http://www.theguardian.com/society/2015/mar/24/benefit-sanctions-trivial-breaches-and-administrative-errors>, accessed 9th April 2015.

One sound way of addressing the problems generated by bureaucratic-administrative domination of sanctioning processes is to give *ex ante* help to claimants to comply with their obligations. This is obviously to be preferred merely to seeking *ex post* to ensure that sanctions are not harshly applied when those obligations may have been breached. In fairness to the DWP, it does take these kinds of steps to assist potentially disadvantaged claimants. For example, under the Universal Credit System, the DWP urges Local Authorities to make specific provision (such as a home visit) for claimants with special or complex needs, in order to help them through the system.¹⁰⁶ Claimants also have 'work coaches' who are meant to identify and allow for such needs when setting conditions that claimants must meet as a part of their 'claimant commitment' (on which the receipt of benefits depends).¹⁰⁷ Further, the DWP permits an official 'appointee' to claim benefit on someone else's behalf, although only in cases of mental capacity or severe disability.¹⁰⁸ However, these compliance-motivated processes should be set against the broader picture, which is dominated by an unholy alliance between the DWP's aggressively pro-prosecution

¹⁰⁶ DWP, *Universal Credit: local Support Services Framework* (DWP, 2013).

¹⁰⁷ HC Work and Pensions Committee, n 80, 27.

¹⁰⁸ <https://www.gov.uk/become-appointee-for-someone-claiming-benefits>, accessed 9th April 2015.

stance on contraventions,¹⁰⁹ and bureaucratic-administrative ideological domination of the conditions of excuse. To enhance the fairness of the system to some of the most disadvantaged people in society, something more thus needs to be added to the compliance-motivated processes.

Excusing Conditions: Between *Gesellschaft* and *Gemeinschaft*

Drawing on the earlier analysis of theft, where information-provision benefit offences are concerned, there should be a formal requirement for the prosecution to show dishonestly, or a defence of reasonable excuse. Such a requirement or defence gives claimants the chance and the confidence to say to the independent magistrate or jury that their false claim, or failure to provide relevant information, was excusable because it was, for example, (a) caused by understandable language or numeracy difficulties, (b) the product of the complexity (to them) of the information required, or (c) the sheer unreasonableness of insisting that the correct information be provided in the way demanded, in all the circumstances.¹¹⁰ Giving claimants otherwise subject to state domination that kind of chance and confidence is a small but important part of what

¹⁰⁹ On the history of such attitudes, see Dee Cook, n 22, ch 6. This pro-prosecution stance inevitably feeds through into the attitude adopted by prosecutors; see Andrew Sanders and Richard Young, 'The Ethics of Prosecution Lawyers' (2004) 7 *Legal Ethics* 190. I am grateful to Jonathan Rogers for this reference.

¹¹⁰ For fuller analysis of such factors, see Walsh and Marston, n 83, 103; J Hughes, 'Defence and Mitigation of Social Welfare Offences' (1987) *New Zealand Law Journal* 192.

it means to uphold their dignity as (would-be) meaningful engagers in civil society, entitled in republican terms to treatment as an equal.

At one time, the courts were prepared to read in a requirement of dishonesty to knowledge-based benefit offences. Courts did this on the grounds that the real evil at which such offences were aimed (as they saw it) was dishonest claiming. Those who simply 'did not think through' the known financial implications of their actions should not be caught by the offence.¹¹¹ That approach was short-lived. It did not survive statutory reforms to benefit entitlement in the 1970s, and is no longer tenable in so far as it relates to statutes – like the Social Security (Fraud) Act 2001 – that place offences requiring proof of dishonesty cheek-by-jowl with offences within the same scheme that have no such requirement. From the 1980s onwards, a statutory requirement for proof of knowledge on D's part either (a) that his or her actions would or might have implications for benefit entitlement, or (b) that a statement made by D was or might be false, came to be regarded by the courts as a sufficient fault requirement.¹¹² The former approach should be revived and embodied in legislation governing all benefit offences; but in itself, that would not be enough.

¹¹¹ See e.g. *Moore v Branton* (1974) 118 SJ 405, where D allowed her husband to resume living with her at weekends, in the hope of a reconciliation, but failed to inform the authorities of this change of circumstances.

¹¹² See *Clear v Smith* [1981] 1 WLR 399.

Alongside this change of offence definition must come a weakening of bureaucratic-administrative control over the interpretations of terms such as 'good reason' or 'reasonable excuse'. Perhaps ironically, one model is provided by the current system for imposing a penalty of £50, when a benefit over-payment is due to claimant error. Under this system, the penalty may be imposed, amongst other circumstances, where:

2. a person has been overpaid as a result of failing, *without reasonable excuse*, to provide information or evidence required in connection with a claim for or award of benefit;
3. a person has been overpaid as a result of failing, *without reasonable excuse*, to notify a relevant change of circumstances.¹¹³

'Reasonable excuse' is defined quite widely to include, 'a credible reason or justification',¹¹⁴ something that might easily cover the sources of disadvantage mentioned above.¹¹⁵ Just as significantly, in the present context, an official finding that there was no reasonable excuse, or that

¹¹³ The Social Security (Civil Penalties) Regulations 2012, in exercise of the powers conferred by ss 115C(2), 115D(1) and (2), 189(1) and 191 of the Social Security Administration Act 1992. See also s 116(1) of the Welfare Reform Act 2012.

¹¹⁴ Memo, DMG 33/12, *Overpayments: Civil Penalties*: <http://stg.dwp.gov.uk/docs/m-33-12.pdf>, accessed 9th April 2015. Some examples are given in the memo.

¹¹⁵ Child Poverty Action Group, 'Claimants Lose on Penalties', <http://www.cpag.org.uk/content/claimants-lose-penalties>, accessed 9th April 2015.

reasonable steps had not been taken to correct an error, is subject to appeal to an independent (first tier) tribunal.

The crucial significance of this latter point is that such an appeal procedure permits the independent tribunal to act like a jury or magistrate judging the dishonesty of someone's conduct. The tribunal can consider an individual's circumstances on their merits, detached from the priorities set by bureaucratic-administrative public interest goals.¹¹⁶ Such a procedure should be in place for all administrative or civil penalties, of the kind considered above. In the power that it gives the tribunal to counter bureaucratic public interest priorities in individual cases, the independent tribunal procedure is inspired by elements of both *Gemeinschaft* and *Gesellschaft* forms of law. On the one hand, justice can be *Gemeinschaft* in character: administered on a case by case basis, looking at the conduct as that of a whole person, a person subject to vulnerabilities, pressures, confusions, disabilities, or other disadvantages, but also a person with at least some capacity meaningfully to engage with their community and society. On the other hand, when justice has this character, it is also rightly open to use by a claimant as a means of asserting, in *Gesellschaft* fashion, their right to

¹¹⁶ For a discussion of the importance of the role of independent appeal tribunals in this context, see Law Commission, n 14, paras 3.159-3.170.

treatment with dignity, and their right treatment as an equal, free from both subjection to bureaucratic imperatives and community prejudice against benefit claimants.¹¹⁷

Sanctions: Between Citizens and Bureaucrats

During the 20th century, the extent and complexity of the bureaucratic state has increased (as has the number of tailor-made regulatory crimes that support the bureaucratic state's operation¹¹⁸), along with its tendency to permit wide-scale administrative specialisation. Inevitably, that has led in many areas to civil service – or delegated agency - 'monopolies' on the expertise and knowledge necessary to ensure regulatory compliance.¹¹⁹ Indeed, the legitimacy of our greatly enhanced bureaucratic-administrative state in part depends on the pretensions of its officials to such knowledge. Famously, Max Weber went so far as to suggest that:

Bureaucracy naturally prefers a poorly informed, and hence powerless, Parliament, at least insofar as this ignorance is compatible with the bureaucracy's own interests...[Even] the

¹¹⁷ See text at n 53.

¹¹⁸ Law Commission, n 14; James Chalmers, "'Frenzied Law-Making": Over-Criminalisation by Numbers' (2014) 67 CLP 483.

¹¹⁹ See, for example, HC Regulatory Reform Committee, *Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda*, 5th Report of Session 2007-08, HC 474-II (TSO, 2008).

absolute monarch, too, is powerless in the face of the superior knowledge of the bureaucratic expert...¹²⁰

Yet, as supposed repositories of the expert knowledge that underpins their authority, bureaucracies face persistent legitimation crises. As long ago as 1973, Sir Kenneth Wheare commented in his Hamlyn Lectures that:

For officials as for citizens the technicality is so great that only a few experts can be expected to understand it. It is not surprising that officials make mistakes in this area. It is not necessary to have recourse to theories of conspiracy against the citizens' purse or of intentional obscurity in the publications of the Department of Inland Revenue to explain why that Department heads the league table for complaints of maladministration from taxpayers. In the administration of social services, similarly, there is a great measure of unavoidable complication in the rules and decisions covering unemployment insurance, entitlement to payments, supplementary benefits and so on which is extremely difficult for the average official to understand, much less explain, to the citizen.¹²¹

¹²⁰ Max Weber, *Economy and Society* (Bedminster Press, 1968), 993; Kenneth Allen, *Explorations in Classical Sociological Theory* (Sage 2013), 206.

¹²¹ Sir KC Wheare, *Maladministration and its Remedies* (Stevens, 1973), 16-17.

Since Wheare's time, there have been repeated calls for better communication between officials and claimants, particularly in relation to the applicability of sanctions,¹²² and in some respects governments have responded to such calls.¹²³ However, Wheare's words still have a resonance, in a world in which regulations to be administered have become more ever more prone to change (sometimes, ironically, in the name of simplification),¹²⁴ in which the number of civil servants responsible for that administration at the DWP has fallen by 23% since 2010,¹²⁵ and in which researchers have found more generally in the civil service, 'an eroding culture of service delivery'.¹²⁶

From these developments, I draw two conclusions, bearing in mind the state's immense and special power over the lives of individuals at the financial margins, in the field of benefit entitlement. First, unduly

¹²² See, for example, Paul Gregg, *Realising Potential: A Vision for Personalised Conditionality and Support* (TSO, 2008).

¹²³ Social Security Advisory Committee, *Communications in the Benefits System*, Occasional Paper no. 11 (TSO, 2013).

¹²⁴ On the problems of frequent legislative change, without consolidation or post-legislative scrutiny, see Law Commission, *Post-Legislative Scrutiny: Law Com Report 302* (TSO 2006).

¹²⁵ <http://www.instituteforgovernment.org.uk/blog/8136/counting-down-the-latest-civil-service-staff-numbers/> accessed 9th April 2015. By contrast, during the same period, staff numbers at HMRC fell only around 8%. The DWP is the biggest Government Department, employing some 80,000 people, compared to HMRC's 60,000. Together, they account for 140,000 civil service staff out of a total of 408,000 in all departments: <http://www.instituteforgovernment.org.uk/blog/9026/numbers-game-the-latest-civil-service-staff-numbers/> accessed 9th April 2015.. The number of civil servants in total has now fallen to the point where, in part as a consequence of other social changes, since 2011 retired civil servants have outnumbered those in work: <http://www.telegraph.co.uk/news/politics/8614173/Retired-civil-servants-outnumber-those-working.html>, accessed 9th April 2015.

¹²⁶ Evidence of Professor Andrew Kakabadse to the House of Commons Select Committee on Public Administration, 8th Report 2013: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/74/7407.htm>, para 55, accessed 9th April 2015.

heavy-handed or otherwise unjust penalisation of substantively blameless benefit claimants, in particular, will never wholly be prevented by well-meaning *ex ante* guidance.¹²⁷ Secondly, it follows that *ex ante* guidance should be supplemented by a requirement to prove dishonesty in benefit claim-related offences, or such offences should be subject to a reasonable excuse defence. In the case of penalties, this requirement or defence should be central to the decisions of any independent tribunal empowered to hear appeals against penalties. This will ensure the magistrate or jury, in the former case, and the independent tribunal in the latter case, can challenge bureaucratic imperatives. They can do this by seeking to pursue a *Gemeinschaft*-inspired form of justice, evaluating individual conduct case-by-case, considering it in context and in the light of the individual as whole person. It is through such a process that the *Gesellschaft*-inspired, republican power to assert one's right to respect for personal dignity, and to treatment as an equal (in contrast to 'equal treatment'), best finds its expression.

Conclusion

Finally, and more broadly, something should be said about bureaucracy and public policy, when it comes to the role of prosecution in both tax

¹²⁷ The HC Work and Pensions Committee has given examples of sanctions being imposed before a claimant has had a chance to put forward a 'good reason' for a compliance failure: HC Work and Pensions Committee, n 80, 36.

and benefit claim cases. In the continuing debate about tax and benefit fraud, it is easy to lose sight of the fact that the core functions of the tax and benefit authorities are not prosecutorial. These core functions are, of course, distributionally consequentialist: revenue collection and benefit conferral, respectively. It follows that, putting aside instances of genuinely fraudulent, systematic and well-organised abuses¹²⁸ (which are comparatively rare¹²⁹), so far as both these core activities are concerned, the predominant goal in relation to alleged breaches should be negotiation to secure compliance or restitution. In relation to that predominant goal, finding 'cheats' through the gathering of evidence for a potential prosecution is merely a secondary or auxiliary goal. The realisation of the predominant goal should shape and define the ideology and practice of the relevant bureaucracies when dealing with alleged wrongdoers in both tax and benefit contexts.

This is so, even though tax fraud accounts for no less than 69%, as a proportion of the £20 billion annual cost of public sector fraud.¹³⁰ It can be argued that, as Christine Parker suggests in the different context

¹²⁸ Where a prosecution may have a clearly 'expressive' purpose: upholding the moral order, secondary to the securing of compliance, in the case in question: see Keith Hawkins, *Law as a Last Resort* (Oxford University Press, 2002). 416. On cases of genuine fraud, http://www.cps.gov.uk/news/latest_news/director_of_public_prosecutions_sets_out_charging_standards_for_benefit_and_tax_credit_fraud/ accessed 9th April 2015.

¹²⁹ Walsh and Marston, n 83, 103.

¹³⁰ By contrast, benefit fraud is only 2% of this sum: see Citizens Advice Scotland, <http://www.cas.org.uk/features/myth-busting-real-figures-benefit-fraud>, accessed 9th April 2015..

of cartel offending,¹³¹ what has been lacking in this context is not the adoption of a more punitive approach. What has been missing is a sustained, public and political commitment to (a) instilling in people the moral importance of compliance, and (b) the provision of the resources and other backing needed to develop confident and determined officials skilled in the use of regulatory techniques to secure such compliance.

For example, the Oakley Review recommended that the DWP:

Work with experts in communication and behavioural insights to test whether variations in the style and content of letters could boost the proportion of claimants who open and engage with the letters they have been sent.¹³²

What remains to be shown is that the 'distancing' between officials and their constituents, that an emphasis on crime and penalty-creation and aggressive prosecution brings about,¹³³ will prove effective at producing a greater degree of compliance in either the tax or the benefit context, without causing a great deal of disproportionate and unjustified pain. Apart from anything else, such an emphasis is liable to falter simply because it goes against the bureaucratic 'grain':

¹³¹ Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Review* 591.

¹³² Matthew Oakley, n 78, 11.

¹³³ What Hawkins calls, 'a declaration of hostilities': n 128, 420.

Certain bureaucrats identify with disadvantaged constituents, such as the poor or the disabled. Other bureaucrats identify with regulated firms, perhaps because they interact so often with the firms' representatives.¹³⁴

¹³⁴ William T Gormley Jr and Steven J Balla, *Bureaucracy and Democracy: Accountability and Performance*, 3rd Edition (Sage, 2013), 52; Gregg Review, n 128, summary.