Rethinking False Beliefs about the Law: Trust and the Epistemic Conditions of Responsibility

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ABSTRACT

The aim of this research is to address the question of how false beliefs about the law should be dealt with by the criminal law. While there has long been discontent with the current position, I argue that proposals to deal with this issue in relation to the *mens rea* are inadequate, and that a more consistent approach to this problem can only be developed by exploring the place of knowledge of the law as an autonomous concept from *mens rea*. This approach thus aims to complement the traditional model of criminal responsibility based exclusively on volitional states (*mens rea*) with one based also on cognitive states. In doing so, this thesis develops a meaningful and operative account of the cognitive or epistemic conditions of criminal responsibility, analytically scrutinising the question of how the criminal law should treat those who act in ignorance of criminal prohibitions and who unwittingly break the law.

Part I of the thesis looks at the conditions for the establishment of criminal responsibility from the perspective of an institutional theory of the criminal law. The first two chapters develop a critical account of the two current ways a false belief might be recognised as a defence – mistake of fact and mistake of law – and the ways that different theoretical accounts, characterised as legal positivism and legal moralism, have sought to address this problem. These chapters also survey the ways that a mistake of law defence might be currently recognised and examines the proposals of those authors willing to expand the conditions under which ignorance of law should exculpate. After that, in chapter III, the dissertation begins to develop a fresh approach based on an *institutional* framework for the criminal law. The chapter explores the connections between criminal law and *interpersonal* and *institutional* trust. The last chapter of part I argues that both volitional and epistemic/cognitive conditions are key in a correct account of deliberation or practical reasoning processes before action. Thereafter the Epistemic Condition on Criminal Responsibility (ECCR) is proposed as an algorithmic test, able to distinguish culpable from non-culpable ignorance.

Part II of the thesis, rejecting the classical dichotomy of mistake of fact *versus* mistake of law, introduces a new kind of approach based on distinguishing between brute facts, institutional facts and institutional commands. Chapter 5 discusses and defends the feasibility of the distinction between brute and institutional facts, arguing that the

perception process of both is dissimilar. Later, the chapter applies the ECCR to existing cases in common law jurisdictions related to false beliefs about brute facts. Chapter 6 scrutinises the practical distinction between false mistakes about institutional facts and false mistakes about institutional commands and applies the ECCR to false beliefs about institutional facts. The last chapter puts the ECCR into practice to address false beliefs about institutional commands. Finally, a general point about false beliefs is considered: when the duty to seek legal advice becomes a right to rely on a trustworthy source.

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AUTHOR'S DECLARATION

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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INTRODUCTION

Together, two friends purchase a mountain bike. A year later, one of them unilaterally decides to sell it, unaware that according to the law of moveable property the bike actually 'belongs to another'. This *false belief* about the 'belonging to another' condition could have several different causes: a) the seller mixes-up the bike with another old, similar mountain bike she has in her shed; b) the seller thinks that because it is her own mountain bike, it does not 'belong to another'; or c) she thinks that after two years in her shed, the other joint share in the property has prescribed and she can sell the mountain bike. Under the first hypothesis, the accused could be exculpated applying the defence of 'mistake of fact'. This category of defence exculpates the accused of criminal responsibility because the false belief impedes the accused from forming the mandatory *mens rea* element required for the crime of theft.[1] On the other hand, criminal law in common law jurisdictions, on the basis of the assumption of *mens rea*, pursues a harsh approach against those who breach a criminal law but are unaware they have done so. Thus, in the other two hypotheses the accused would probably be convicted of theft.[2] This dissertation proposes that both the asymmetric treatment of factual and normative false beliefs, and also the circumstances where false beliefs of law should be a defence, would be better analysed in terms of the epistemic conditions of the citizen rather than through notions of *mens rea*. Accordingly, this thesis proposes a model of responsibility based exclusively on volitional states with one based also on cognitive states. As a result, the citizen's reasons for action are determined jointly by volitional and cognitive states.

A common aspiration of legal philosophers and theorists, who want to define and frame criminal responsibility, is to identify the necessary and sufficient conditions that must be met for a correct ascription of culpability. This is normally done by focusing on *mens rea* (fault). In this thesis I want to contribute to this by arguing for a broader approach that looks at the epistemic conditions rather than *mens rea* narrowly conceived. In doing so, this investigation shall analytically scrutinise the question of how the criminal law should treat those who act with a false belief about criminal prohibitions and who unwittingly break the law. False beliefs have been traditionally categorised, not without

[1] Theft Act 1968 S.1 (1)

[2] A defence may be available if the accused is able to relate the issue to an error of a concept of the civil law that negates *mens rea*. See *R v Smith* (1974) QB 354.

controversy,[3] as mistakes of fact and of law. Where the current law about mistakes of fact is undisputed, most contemporary legal commentators in common law jurisdictions are of the view that the circumstances under which ignorance of the law exculpates should be wider than they presently are.[4] The adage 'ignorance of the law is no excuse' is widely known in most common law jurisdictions, though very much criticized. For that reason, although a comprehensive comparative legal survey is not the main contribution of this research, the main focus of this thesis will be ignorance of the law in common law jurisdictions.[5]

Two prominent legal theorists have relatively recently raised the alarm about the untenable current situation of the penal justice in this area. Writing in 2011, Ashworth argued that the 'ignorance of the law is no defence' adage is a "… preposterous doctrine resting on insecure foundations within the criminal law and on questionable propositions about the political obligations of individuals and of the State".[6] He pointed out that to exclude any defence based on ignorance is "[…] manifestly unfair, given the diverse, often technical, and changing content of the criminal law ".[7] Ashworth acknowledges that citizens have a *duty* to find out about the criminal law, but argues that this should be balanced against the state's duty to adequately publish the law. Arguing that the criminal law must be prospective, certain and accessible, Ashworth thus proposes the recognition of a defence of reasonable ignorance of criminal law. Likewise, in 2016, Husak published a monograph on ignorance of law arguing that "[…] no core area of the substantive criminal law is more ripe for fundamental reform".[8] He defends the extension of *mens rea* to accommodate not only intention but also knowledge of the applicable law, contradicting

[3] L. Alexander "Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles" *Law and Philosophy* (1993) 12:33

[4] A.T.H. Smith, "Error and Mistake of Law in Anglo-American Criminal Law" (1985) 14 *Common Law World Review* 3:32; P. Matthews, "Ignorance of the Law is no Excuse?" (1983) *L.S.* 3:174-192; D. O'Connor, "Mistake and Ignorance in Criminal Cases" (1976) *M.L.R.* 32:644-662; B.R. Grace, "Ignorance and Mistake in the Criminal Law" (1986) *Columbia Law Review* 86:1932-1416; D. Husak, "Ignorance of Law and Duties of Citizens" (1994) *L.S.* 14:105-115; D. Husak and A. von Hirsch, "Culpability and Mistake of Law" in *Action and Value in Criminal Law* (S. Shute, J. Gardner and J. Horder (eds) (1996) pp157-174; D. Husak "Mistake of Law and Culpability" (2010). *Criminal Law and Philosophy* 4(2):135-159; D. Husak "*Ignorance of Law: A Philosophical Inquiry"* (2016); A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" (2011) *Modern Law Review* 74:1, pp1-26; R.G. Singer "The Proposed Duty to Inquiry as Affected by Recent Criminal Law Decisions in United States Supreme Court" (1999-2000) *Buffalo criminal Law Review* 3:701-754; K. Simons "Mistake and Impossibility, Law and Fact, and Culpability" 81 *Journal of Criminal Law and Criminology* (1990) pp447-517; J. Dressler, *Understanding Criminal Law* (1987) pp150 ss

[5] That said, the arguments developed in the thesis have wider implications, including factual false beliefs.

[6] A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" (2011) *Modern Law Review* at introduction, p1

[7] Ibd at p24

[8] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016) at p2

the historical approach of the common law tradition to these questions. According to Husak, only the akratic accused, that is, those who believe that what they are doing is wrong and do it anyway, should be held fully responsible.[9] He also defends the idea that those accused that do not recognise that their conduct is criminal but are aware of a risk that their conduct might be wrongful should have their culpability diminished. This formula basically clones the German dogmatic solution for mistake of law,[10] where the mental element includes knowledge and a distinction is made between unavoidable and avoidable mistakes. In the former, the accused, completely unaware of the criminality of the conduct, is acquitted. In the latter, the accused has taken some substantial risk about the potential illegality of their conduct and, as result, a lesser degree of responsibility is attached than to one who knew the illegality of their actions. While they are highly critical of the existing law, neither Ashworth nor Husak offer a clear or detailed practical solution to the questions. Husak recognises that his proposal for "a theory of when ignorance of morality is exculpatory"[11] is difficult to implement in the real world.[12] This is mainly because the inculpatory and exculpatory work in terms of blameworthiness is done by morality. Thus, knowledge or ignorance of the law is immaterial because it does not introduce new arguments for conviction. Equally, Ashworth's proposal of a "general but circumscribed defence of excusable ignorance of the law",[13] although a priori acceptable, only outlines a broad framework for the defence: a test that appraises what is reasonable to be expected from a citizen in the accused's position, also taking into account "capacity-based exceptions".[14] Thus, the major works to date on error of law both suffer from problems: Husak's because it is not workable in practice and Ashworth's because it is not comprehensive nor structured in principle.

In terms of jurisdictional focus, although some of the arguments of this thesis could be perfectively valid in continental or civil law jurisdictions, the thesis is mainly

[9] See G. Yaffe "Is Akrasia Necessary for Culpability? On Douglas Husak's Ignorance of Law" *Crim. Law and Philosophy* (2018) 12:341-349

[10] H. Welzel *Das deutsche Strafrecht. Eine systematische Darstellung* (1969) p168; P. Cramer and D. Sterberg-Lieben, in A. Schonke and H. Schroder (eds) *Strafgesetzbuch Kommentar* (2006); C. Roxin *AT* (2006); H. Rudolphi, In H. Rudolphi *et al.* (eds) *Systematischer Kommentar zum Strafgesetzbuch*; F.C. Schroder in B. Jähnke *et al*. (eds.), *Leipziger Kommentar* (1994). M. Cerezo *Curso de Derecho penal español. Parte general III. Teoría jurídica del delito/2* (2001) pp119, 131 and ss.; M. Diaz y Garcia Canlledo *Error sobre elementos normativos* (2008) pp173, 189, 215; P. Luzon *Curso de derecho penal. Parte general I* (1996) pp465 and ss; C. Muñoz *Derecho penal. Parte general* (2007) pp383, 386.

[11] D. Husak *Ignorance of Law: A Philosophical Inquiry* (2016) at p256.

[12] Ibd at Chapter V

[13] A. Ashworth, "Ignorance of the Criminal Law, and Duties to Avoid it" (2011) *Modern Law Review* 74(1):1-26 at p6

[14] Ibd at p6

orientated to provide a solution for false beliefs in the common law environment. The aim of this research is to address the question of how false beliefs about the law should be dealt with by criminal law. Where in civil law jurisdictions this defence of "error of law" has been settled[15], in common law jurisdictions, as Leverick and Chalmers pointed out, "it is difficult to think of another defence where the balance of academic opinions is so out of step with the law as it stands"[16]. For that reason, cases-law and doctrine from these jurisdictions have been used to support the proposals made. However, the thesis can clearly be defined as a legal theory orientated research. As a result this research has neither the exhaustive aim to provide a complete appraisal for every particular common law jurisdiction nor comprehensive individual solutions for each one. In this way, the goal of the thesis is to provide a *fresh conceptual framework* for false beliefs.

The way that the current law treats citizens who breach criminal laws under false normative beliefs is normatively indefensible. Lack of awareness of criminal laws can indeed diminish or exclude criminal responsibility, but it is not clear when or how it should do so. As we will see later, crucial theoretical disputes about the function and scope of the criminal law must be resolved before a coherent position can be identified. In particular, attention must be paid to the extent of knowledge of the law and the conceptual contours of criminal responsibility. For this reason, the dissertation starts by analysing two extant accounts of criminal law, which I shall term the legal moralist and legal positivist approaches. For those who defend a legal moralist stance, criminalization and punishment is morally justified when the accused has engaged in moral wrongdoing and not just violated a criminal norm. On this account criminal laws are a sub-category[17] of morality that do not create any fresh moral obligation to conform to their mandate. Only culpable wrongs provide a desert base argument for punishment; thus criminalising new conduct is completely immaterial because it does not introduce new arguments for desert. Knowledge of the law is then irrelevant and "the true normative basis of exculpation is ignorance of the morality underlying law, and not ignorance of the law itself".[18]

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[15] See as an example art 17 German Penal Code:" If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable , the sentence may mitigated pursuant to art 49 (1)

[16] J. Chalmers and F. Leverick *Criminal Defences and Pleas in Bar of Trial* (2006) at p262. See also A. Ashworth "Ignorance of the criminal law, and duties to avoid it" *Modern Law Review* (2011) 74(1):1-26. Also D. Husak, *Ignorance of law: A philosophical inquiry* (2016)

[17] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016) at p259

[18] Ibd at p263

Legal positivists hold a friendlier approach towards the relevance of knowledge arguing for, based on the rational and deliberative attitude of the agent, the prospective guiding function of legal norms. From this stance, criminal laws (not morality) are exclusionary reasons for action; conditions considered in our deliberation before action. As rational agents we should not be made responsible for failing to be guided by a reason we did not believe we had. Knowledge of the law is a sort of relationship or access to the command or prohibition of the criminal norm; thus, ignorance about its content must be relevant to some extent. In short, if ignorance corrupts the deliberation of the citizen who is willing to do what is required, actions performed in ignorance of the criminal law should be affect the attribution of criminal responsibility.

I shall argue in this thesis that both accounts are too narrow in scope. Firstly, criminal law is more than a subcategory of morality and for that reason legality[19] is always required to justify criminalization and punishment. Secondly, we are not only, as positivists claim, rational beings but are social creatures as well. In our deliberation we must not only take into account legal norms as a reason for action, but also the mental life of others. We have the cognitive capacity to recognise during our deliberation process that other agents' deliberations will depend on assumptions about what we will do. In our deliberations we take into consideration that we count on the deliberation process of others, and that we have the expectation that others will comply with legal norms and behave accordingly. These arguments are the structural support for the institutional conceptual framework proposed in this thesis. As social creatures we collectively attribute certain status to persons or things for purposes beyond their mere physical structures, and we expect that this deontic institutional framework will be respected. A twenty-pound note, for example, is just a piece of paper, only able to perform its function as currency by virtue of the fact that it has a recognised status that enables it to perform functions in a way it could not do without collective recognition. Within this institutional conceptual framework, knowledge of the law is not mere understanding of legal norms but the awareness of complex institutional facts and institutional structures and the social order it brings about. Only by knowing the institutional framework, as reason responsive agents, can we interact without friction and *trust* others with the expectation that other users know the specific conduct anticipated.

[19] Understood as a variant of the *nulla poenna sine praevia lege* principle

My first concern in the thesis, once the relevance of knowledge has been substantiated, is how to identify those situations where the citizen fails to notice a criminal norm as a reason for action because he is under a false normative belief. There seem to be two possible options here. The first alternative would be to extend the mental element of a crime not only to volitional but also to cognitive elements. The second would involve developing an autonomous legal solution, separate from the *mens rea*. The first option is the route followed by the German law,[20] explicitly suggested by Husak,[21] and implicit in Ashworth's proposal.[22] This alternative would focus on the conceptual contours of *mens rea*. Three significant reasons have pushed my proposal towards an independent treatment (from the *mens rea* element) for cognitive conditions: first, the authoritative consensus existing in common law jurisdictions that knowledge about the relevant law is not part of the mental element. Second, including the cognitive condition in the *mens rea* element would confront a legal landscape that includes many thousands of strict liability offences currently in force. Due to the pivotal role that strict liability offences have in common law jurisdictions, it would be more realistic not to require intention to commit the criminal conduct, but to defend the evaluation of the cognitive condition outside (and in addition to) the mental element. This solution does not contravene or disrupt the current regulatory framework. Accordingly, it would be permissible to *prima facie* attribute criminal responsibility to an accused without proof of *mens rea (*cognitively-free), and later exclude responsibility because the accused lacks the epistemic/cognitive conditions necessary for conviction. Finally, my awareness about the (still unsettled) controversy existing in the German dogmatic between defenders of the 'dolo theory' (that proposes a concept of *dolus malus* that includes knowledge*)* versus the defenders of the "culpability (schuld) theory" (who defend a concept of *dolus naturalis,* and solves knowledge in the *schuld* category)".[23] This unsettled dispute has generated a permanent instability in the categories of the German theory of crime.[24] Therefore, to insist on the inclusion of the cognitive condition

[20] See G. Artz "The Problem of Mistake of Law" *BYU law review* (1986) 3:8

[21] D. Husak *Ignorance of Law: A Philosophical Inquiry* (2016) at p2

[22] Any proposal of a general defence of excusable ignorance of law, as proposed by Ashworth, certainly requires reversing the "*ignorance iuris nocet*" presumption before giving a detailed account of those exceptions under which ignorance of law would not exculpate. As the German law example accredits, it is very complicated to achieve a general defence without a revision of the mental element that includes, in addition to intention, knowledge of the law

[23] In German see: E. Mezger *Strafrecht. Ein Lehrbuch* (1949); V.J. Bauman, V.J. Weber, W. Mitsch, *Strafrecht. Allgemeiner Teil. Lehrbuch* (2003) p37 and ss; E. Schmishauser *Strafrecht. Allgemeiner Teil. Studienbuch* (1984) p36, 90. In Spanish see: M. Rodriguez *Derecho penal. Parte general* (1978) Ch. XIII.A; L. Torio "El 'Error Iuris', Perspectivas Materiales y Sistemáticas" *ADPCP* (1975) p38, among others. A. Cobo del Rosal *Derecho penal. Parte general* (1999) p619

[24] Mainly between the limits and content of the Tatbestand and Schuld categories of the German theory of crime

within the *mens rea* element, as Husak proposes, would certainly generate more dogmatic problems than it solves.

Having explored this possibility, and its limitations, the thesis moves then to the second feasible alternative, fleshing out an autonomous algorithmic test able to distinguish culpable from non-culpable ignorance. Or, in other words, a structured functional judgement to decide when an ignorant or unaware citizen would be held culpable for something he unwittingly did or brought about. To achieve this, the dissertation starts to interweave the fibres of what I term the Epistemic Condition of Criminal Responsibility (ECCR). Its cornerstone is the latent and updatable knowledge that the citizen possesses immediately before action. As reason responsive agents, we can only be held responsible when we disregard the suspicion, triggered by our latent knowledge, that our conduct could be criminal. The rest of the elements of the architectonical epistemic condition building will be set in reference to this initial knowledge.

Another concern the thesis confronts is the unsettled traditional categorisation distinguishing mistakes of fact from mistakes of law. A detailed analysis of this classification identifies that in some situations some mistakes of law could receive the same treatment as mistakes of facts and vice versa without any coherent reason. This is mainly because mistakes of law can range from complete ignorance that the conduct is regulated at all, to lack of awareness of the extension of some normative element included in the description of the conduct. This thesis will argue for the replacement of this distinction with a more consistent categorisation. The gist of this fresh classification proposes a sharp distinction between the conduct under appraisal and the appraisal of the conduct (as criminal). Criminal laws can always be broken down into the descriptions of the criminalised conduct on the one hand, and the appraisal of this conduct as criminal on the other. False beliefs can arise both about some element used in the description of the conduct, or about the appraisal as criminal of the conduct itself. In the latter, the false belief is about the existence of the prohibition or command of particular conduct. In the former, the agent acts with false beliefs about a component or factor that constitutes a definitional element of a criminal offence. Two types of facts are normally used to describe criminal conduct. Some descriptive components (for example ‘ownership’) only have legal or institutional meaning, whereas others do not (for example ‘human being’). This is the reason the thesis proposes a trilogy of ignorance, distinguishing between false beliefs about brute facts, institutional facts and the institutional command.

Before providing a summary of the organisational structure of the thesis, some methodological comments should be provided. Holmes, probably the most relevant and influential American jurist, in the 19th century noted that: "For the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistic and the master of economics".[25] This research, although it could not be methodologically labelled as interdisciplinary, definitely follows the tendency proposed by Holmes. This thesis collects legal sources (both statutes and court cases) in order to interpret and address contradictions, but also abandons the notion of law as a self-contained discipline. The reason I decided to incorporate perspectives, concepts, arguments and theories from non-legal disciplines are diverse, but I would say that the main reason is the desire to avoid an insular atmosphere that might be predominant within the current methodologies and vocabularies between those scholars who discuss core criminal law issues. If my intuition is correct, this intellectual orthodoxy would hinder the detection and debate of fundamental blind spots, in a discipline that we should not forget is, by nature, founded on precedent and shared assumptions. For that reason, the deliberate inclusion in this research of input and vocabulary from disciplines like psychology, sociology or economics can have a disruptive effect on the somewhat enclosed approaches of current debates about the criminal law.

Building bridges between criminal law and other disciplines always implies challenges. Potential risks like a wrong understanding of the other discipline, or choosing irrelevant commentators are always present. Aware of these pitfalls, during the research I have tried to select significant commentators and undertake a solid understanding of the topics in the incorporated disciplines. The use of language could be a revealing example of my approach. Criminal law vocabulary routinely revolves around words like 'wrongdoing', 'accused', 'blameworthiness', 'culpable', 'retribution', 'wrongdoer', '*mens rea*', 'mistake', 'retribution', 'punishment', 'deterrence', 'desert', etc., most of them with a suspicious, moralistic element. This shared vocabulary not only facilitates and induces the consolidation of standards and categories that eases internal communication or debate between academics, practitioners and lawmakers, but also, exemplifies the intellectual orthodoxy highlighted above. This vocabulary is intentionally avoided and rarely used in this dissertation where, in contrast, words like 'expectation', 'trust', 'deliberation', 'institutional', 'fact', 'citizen', 'sociological', 'belief', 'legality', and 'legal norm' are key.

[25] O. Wendell Holmes Jr. "The Path of the Law" *Harv. L. Rev.* 10:457 (1897) p469

Finally, several terms that will be used in the ensuing discussions and proposals are in need of clarification. Three different words are traditionally used in this context: error, mistake and ignorance. In ordinary usage, error and mistake bear the same meaning.[26] They admit some knowledge but imply or suggest some grade of inadvertency missing in such a case. Ignorance, on the other hand, implies total lack of knowledge of the subject matter. In the legal environment, however, the distinction has not been recognised.[27] Sometimes the terms have been related to "ignorance of law"[28] and sometimes to "mistake of fact"[29] and, on occasion, the words ignorance or mistake have been applied to both types of error[30] - indeed, in *Dotson v State*[31] both were combined. Nor do authors make univocal use of the terms.[32] Given this, and the epistemic approach of this thesis, where knowledge and rationality of belief are key, I use the term "false belief". This approach is consistent with the belief-based account of awareness defended in this thesis. Awareness always requires belief, but true justified belief. It seems incongruous to defend that awareness of a particular fact is possible if this particular fact is false. For example, I cannot be aware that there is a snake in the dinning room if it is just a painted rope. Awareness requires then a double dimension: a subjective dimension (belief) and an objective dimension (truth). The practical argument for using "false belief" rests on the fact that knowledge and belief form the basis of action: it is only appropriate to treat A as a reason for action if and only if you know A. Only true justified beliefs can be proper reasons for action.[33] For that reason, this thesis will determine the conditions under which a "false belief"

[26] Both terms are interchangeable, but it could be argued that, in some contexts, an error is more appropriate than a mistake. For example, it is highly accepted to use the term "error" in a technical, computing, coding and processes context. In other contexts, error could describe a more severe miscalculation than mistake

[27] P. Keedy "Ignorance and Mistake in the Criminal Law" *Harvard Law Review* 75 (1908) 22(2):75-96

[28] *United States v One Buick Coach Automobile*, 34 F (2d) 318, 320 (N. D. Ind. 1929)

[29] *Hunter v State*, 158 Tenn. 63, 73, I2 S.W. (2d) 361,363, (1928)

[30] *Reynolds v United States* 98 US 145 (1878); *Hamilton v State*, 115 Texas Cr C 96,97 29 SW (2d) 777,778.

[31] "[…] Ignorance or mistake, as to these facts […] absolves from criminal responsibility." 25 Minn. 29, 38 (1878)

[32] A. Ashworth for example uses "ignorance or mistake of law" (A. Ashworth, *Principles of Criminal Law* (2009) ch. 6.5). F. Leverick and J Chalmers name the defences as "error of facts" and "error of law", see Chapter 12, 13 in J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006); A.P. and G.R. Sullivan use the terms "mistake of fact" and "ignorance and mistake of law" (Chapter 18.1 and 18.2 in A.P. in A.P. Simester and G.R. Sullivan *Criminal Law, Theory and Practice* (2007))

[33] A prominent view in contemporary epistemology holds that practical reasoning is governed by an epistemic norm. See D. Fassio ,"Is there an epistemic norm of practical reasoning? *Philosophical studies* (2017) 174(9):2137-2166; J. Brown "Knowledge and practical reason" *Philosophy Compass,* (2008) 3(6):1135–1152; J. Brown (2010) "Fallibilism and the knowledge norm for assertion and practical reasoning" in J. Brown and H. Cappelen (eds) *Assertion* (2010) pp153–174; N. Arpaly and T. Schroeder "Deliberation and Acting for Reasons" *Philosophical Review* (2012) 121(2):209–239

should excuse an actor of criminal responsibility. "False belief" encompasses in this research both a complete lack of knowledge (ignorance), or some kind of deficient knowledge (mistake or error), and also includes factual and normative beliefs. Finally, existing legal classifications (in the common law approach) typically distinguish between mistake, ignorance, etc. and certain topics as mistaken self-defense have generated an enormous literature. My term "False belief" is intended to cut across these classifications. But while this might then have implications for approaches to (say) error, I won't be addressing these here. "False belief" could be counterpoised to "mistaken belief" understood as those situations where a citizen´s conduct is criminal because he *mistakenly* believes that it is permissible (justifications). Currently these situations are discussed under the heading of mistake about a defence or putative defence. Among putative defences, mistaken beliefs about self-defence in particular are a highly controversial topic that has attracted an enormous amount of academic attention. I will intentionally avoid this topic in this thesis, since it probably requires a thesis by itself. Even though it is not going to be properly fleshed out in this research, at the end of the thesis it will be argued that any future research about mistaken belief about defences could be accommodated within the institutional conceptual framework suggested in this thesis[34].

This thesis consists of two parts. Part I contains four chapters and reviews the contemporary solutions proposed for ignorance of law before providing a new institutional conceptual framework for criminal law in general, and ignorance in particular. Chapter 1 sets out an analytical overview of the two current ways a false belief might be recognised as a defence: mistake of fact and mistake of law. Both defences are granted when the mistake negates the *mens rea* element. This traditional categorisation works satisfactorily in situations of mistake of fact, but the *"ignorantia Juris non excusat"* maxim has been widely censured as manifestly unfair. Chapter 1 introduces the argument for its unfairness that is then fleshed out in later chapters: as rational creatures we can only be held criminally responsible by virtue of our capacity to respond and be guided by reasons. Citizens can be guided *only* by the criminal laws available to them in their deliberation process. Therefore, to attribute the same level of culpability to the citizen who is aware of the criminal law as to those who, acting under ignorance, are unable to take the law as a reason for action is manifestly unfair. After review of the traditional rationales that support

[34] At p239

the irrelevance of normative false beliefs, the chapter discusses the proposal of those authors willing to expand the conditions under which ignorance of law should exculpate. It also surveys the ways that a mistake of law defence might be currently recognised. One of them, situations where a mistake of civil law negates *mens rea*, is a generalist defence. The last procedural solution, officially induced mistake, only applies in very specific conditions. Finally, the 'duty to know' the law proposed by Ashworth is scrutinised.

If citizens can only be guided by criminal laws available to them during their deliberation process, knowledge of the law is key. For that reason, chapter 2 scrutinises the *legal moralist* and *legal positivist* accounts of the law and their inferences for knowledge. The chapter, after an exhaustive revision of the position of a wide range of influential legal moralist commentators discussing *ignorantia iuris*, explains the reason why knowledge of the law has been historically peripheral in its account of responsibility. Thereafter, the legal positivist account of law and its conclusions for knowledge is set out. The chapter provides a revision of the most relevant positivist authors and their positions on knowledge. The positivist 'guidance view' is proposed as a sufficient condition for responsibility: we can only be held responsible for behaviours guided by our capacities as rational agents, and performed and guided for what we believe to be adequate reasons. Therefore, false beliefs are crucial in the attribution of criminal responsibility. Finally, the chapter also highlights the insignificance of the sociological dimension of law in the positivist account, emphasising that we are not only rational but social agents.

Once the moralist framework is rejected and the positivist partially accepted, chapter 3 provides a fresh institutional framework for the criminal law. The proposal initially rests on the theory of social institutions formulated by John Searle and developed in the legal domain by MacCormick and Ota Weinberger. I defend the position that modern societies exist within a constellation of institutional facts, like currency or borders. For *functions* beyond mere biological or physical structures (brute facts), we collectively attribute certain *statuses* to persons, objects or other entities (institutional facts). The institutional structure derived from the *status function* encloses a waterfall of deontic-normative powers, rights and duties, that provides status holders with a common reason for action in our practical reasoning. Institutional facts guide us but also disclose to others what they can expect from us. Only within normative frameworks of reciprocal *expectations* can we interact, cooperate and *trust* strangers. The chapter then moves on to scrutinise and introduce an interesting connection between criminal law and trust. The

result of this connection is a dual dimension in the link between criminal law and trust: the behavioural descriptive side of criminal laws endorses or reassures *interpersonal trust* where criminal punishment has the function to reinforce and reaffirm *institutional trust*. Finally, before illustrating the relevance of knowledge in the institutional framework, this chapter defends a fresh account of criminal responsibility and a new classification of offences.

The aim of chapter 4 is to flesh out the Epistemic Condition of Criminal Responsibility (ECCR). Of its six main sections, section 4.2 criticises those retributivist accounts of criminal law that reject any relevance of criminal norms in the agent's deliberative process. Section 4.3 defends the argument that both volitional and epistemic/cognitive conditions are key in correct deliberation or practical reasoning processes. It also justifies wider excusatory consequences for false beliefs. Therefore, in those situations where the deliberative mechanism works correctly but the citizen fails to notice or respond to legal reasons because he acts under a false belief, it is fair to consider an exoneration of responsibility. Section 4.4 develops the different stages of the ECCR. The ECCR is articulated over two disjunctive momentums: first, criminal responsibility is directly attributed when the citizen acts knowingly; later the ECCR discusses the possibility to attribute responsibility to the unwitting citizen who was culpable of his false belief. After that, the chapter discusses different alternatives to ascertain under which circumstances the agent's ignorance is culpable. Finally, a deontic/normative proposal for culpable ignorance is provided.

Part II, rejecting the classical dichotomy of mistake of fact *versus* mistake of law, introduces a fresh trilogy of potential false beliefs, as noted above. Section 5.2 of chapter 5 discusses and defends the feasibility of the distinction between brute and institutional facts. The chapter argues that the perception process of both is different: instantaneous in the former but evaluative in the latter. To support the differentiation, the work of Kahneman[35] about fast/slow thinking is introduced. Once the feasibility of the differentiation is evidenced, the chapter explains in detail the features of false beliefs about brute facts. Finally, the chapter applies the ECCR to existing law cases in the Anglo-American jurisdiction related to false beliefs about brute facts.

[35] D. Kanehman *Thinking, Fast and Slow* (2011)

Chapter 6 begins by analysing the practical distinction between false mistakes about institutional facts and false mistakes about the institutional command. To do so, firstly, the chapter explores in more depth the differentiation between brute and institutional facts. It shall be explained that often false beliefs about brute facts deal with the *existence* of the fact, whereas false beliefs about institutional facts deal with the *extension* of the fact. As perception about false beliefs about the command also requires a similar evaluative assessment, differentiation between false beliefs about the command or the institutional fact could be unrealistic. In order to provide a realistic differentiation, the chapter highlights the difference between the evaluation that conduct is criminal on the one hand, and the description of the evaluated conduct. A false belief about the command relates to the former, whereas a false belief about the institutional command corresponds to the latter. The rest of the chapter applies the ECCR to false beliefs about institutional facts.

Finally, chapter 7 contains two different parts. The first is dedicated to false beliefs about the institutional command. I attempt to illustrate what kind of (standard of) knowledge is required to determine that the citizen acts with full awareness of the recognised institutional framework. Three forms of awareness are discussed: knowledge about the immorality, illegality and criminality of the conduct. The conclusion is that only when the citizen was aware that his conduct was criminal can any excusatory effect be precluded. Later, the chapter applies the ECCR to false beliefs about the institutional command. The last part of the chapter discusses the issue of when the duty to seek advice becomes a right to rely on a trustworthy source.

PART I

CHAPTER 1

ANALYSIS OF THE CURRENT SOLUTIONS CONCERNING FALSE BELIEFS

1.1 Introduction

The main aim of this chapter is to acquaint the reader with both the current solutions provided by courts and the excusatory frameworks proposed by scholars towards false beliefs in the common law jurisdictions. In both cases, the preferred solution has been to utilise the binomial "mistake of law" or "mistake of fact" defence scheme. With few exceptions, exculpation is only granted if the false belief impedes the accused from forming the mandatory *mens rea* element required for the crime. The outcomes of this method have been commonly accepted in cases of factual mistake. However, the widely accepted exclusion of cognitive conditions[36] within the mental element, along with the potential unfairness that this brings, has caused the mistake of law defence to become a controversial topic:[37] as rational agents, we ought only to be held responsible on the basis of our capacity to respond and ability to be guided

[36] 'Cognitive conditions' are understood here as the various states of knowledge that the agent may possess excluding cognitive impairments. Most common law jurisdictions have insanity/mental disorder and diminished responsibility defences.

[37] For authors who defend the error of law rule see: R.M. Perkins "Ignorance and mistake in criminal law" *University of Pennsylvania Law Review* (1939) 35:70; L. Hall and S. Seligman "Mistake of Law and *Mens Rea*" *University of Chicago Law Review* (1940-1941) 8:641-683; E. Keedy " Ignorance and Mistake in Criminal Law" *Harvard Law Review* (1908-1909) 22:75-96; J. Hall "Ignorance and Mistake in Criminal Law" *Indiana Law Journal* (1957) 33:1-44. For authors who defend that the scope of the defence should be wider see: A.T.H. Smiths "Error and Mistake of Law in Anglo-American Criminal Law" *Common Law World Review* (1985) 14:3-32; P. Matthews "Ignorance of the Law is not Excuse?" *L.S.* (1983) 3:174-192; D. O'Connor , "Mistake and Ignorance in criminal cases" *M.L.R.* (1976) 32:644-662; B.R. Grace "Ignorance and Mistake in the Criminal Law" *Columbia Law Review* (1986) 86:1932-1416; D. Husak "Ignorance of Law and Duties of Citizens" *L.S.* (1994) 14:105-115; D. Husak and A. von Hirsch "Culpability and Mistake of Law" in *Action and Value in Criminal Law* (S. Shute, J, Gardner and J. Horder (eds) (1996) pp157-174. D. Husak, "Mistake of Law and Culpability" *Criminal Law and Philosophy* (2010) 4(2): 135-159. D. Husak *"Ignorance of Law: A philosophical Inquiry"* New York: Oxford University Press (2016). A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" *Modern Law Review* (2011) 74(1):1-26. R.G Singer "The Proposed Duty to Inquiry as Affected by Recent Criminal Law Decisions in United States Supreme Court" *Buffalo Criminal Law Review* (1999-2000) 3:701-754; K. Simons "Mistake and Impossibility, Law and Fact, and Culpability" *Journal of Criminal law and Criminology* (1990) 81:447-517; J. Dressler *Understanding Criminal Law* (1987), pp150 ss

by reasons. Citizens can only be guided by those criminal norms available to them in their deliberation process. Thus, to attribute the same level of culpability to those citizens who are unaware of the law, and do not have access to those guiding reasons, is manifestly unfair.

As much of the following chapter will be dedicated to analysing the arguments concerning the contentious topic of mistake of law, it would be necessary to introduce the problems with the current law on error of fact that will be addressed later in chapter 5. One of the problems arises identifying whether the mistake which the accused claims he has made is one of criminal law or fact[38]. This is the argument claimed by Alexander who points out that the distinction would be arbitrary: "…because all legal prohibitions consist of facts–such as, that this legislative body passed this law that contains these words that have this intended meaning––and that because all mistakes of fact are also mistakes about whether the law prohibits a particular token of conduct, all mistakes of law could be looked at as mistakes of fact, and vice versa"[39]. Furthermore, the current solution for error of fact as denials of the *mens rea* element is controversial. Where intention or subjective recklessness in relation to some elements of the *actus reus* is required for conviction, an error of fact which prevents either mental state will be excused[40]. However, as Alldridge[41] and Tur [42]pointed out, this subjectivist approach could be overly simplistic in cases of sexual offences. Accordingly, this will be expanded upon in chapter 5 of this research where two particular issues in the sexual offences field will be discussed[43]: "honest and reasonable belief about consent to intercourse" and "strict liability offences as to the age of the complainer".

This chapter contains five parts that describe the current law in common law jurisdictions, as well as the proposals made by scholars for reform of this area. Section 1.2 introduces both defences and raises the ontological and practical difficulty of segregating legal from factual elements in the definition of a crime. Section 1.3 introduces the range of

[38] See D. Ormerod *Smith's and Hogan's Criminal Law* (2008) at p320. See also the case Lee [2001] Cr App R 293

[39] L. Alexander "Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles" *Law and Philosophy* (1993) 12:33

[40] See DPP v Morgan [1976] AC 182

[41] P. Alldridge *Relocating Criminal Law* (2000) at p88

[42] R. Tur "Subjectivism and Objectivism: Towards Synthesis" In S Shute, J Gardner and J Horder (eds) *Action and Value in Criminal Law* (1993) at p213.

[43] See chapter 5.2

rationales historically offered by scholars to support the irrelevance of cognitive conditions. Both substantive and procedural proposals have been made by courts and legal philosophers to mitigate the severity and unfair consequences of the current *ignorantia iuris* dogma. Section 1.4 of the chapter presents the proposals for a substantive defence defended mainly by Ashworth and Husak. The procedural defence of "officially induced error of law" is explored in section 1.5. This procedural category only applies where the accused sought advice about the law. Therefore, where the two previous categories are general solutions, officially induced error applies only in a very specific category of cases. Section 1.6 critically examines these proposals and, in disapproving the "duty to know the law"[44] doctrine, proposes a more appropriate "burden to know the law" perspective.

1.2 False beliefs that negate *mens rea*

Criminal law, within the conventional offences/defences conceptual framework, has traditionally treated false beliefs through the *mens rea* element.[45] As a result, false beliefs do not operate as a conventional, substantive defence, but rather as a 'failure to proof', also referred to as 'absence of an element defences'[46] or 'evidential defences'.[47] This category of 'defence' exculpates the citizen of criminal responsibility because the prosecution fails to prove an essential element of the offence, specifically the required mental state (or *mens rea*).

The exculpatory consequences of a false belief can be found on either a factual or legal element of the crime. An example of the former would be the hunter who kills another hunter honestly mistaking them for a deer. As murder requires the intentional or wickedly reckless[48] killing of another human being, the hunter's responsibility might well be excluded because, on the facts, he does not display sufficient *mens rea* for murder. Since the commission of a crime requires both the *actus reus* and the *mens rea* elements to be present, to convict the factually mistaken hunter would involve punishing him without

[44] The 'duty to know' doctrine has been discussed by both of the most dynamic academics in this field, A. Ashworth and D. Husak. See: A. Ashworth, "Ignorance of the Criminal Law, and Cuties to Avoid it" *Modern Law Review* (2011) 74(1):1-26; D. Husak "Ignorance of Law and Duties of Citizens" *L.S.* (1994) 14:105-115

[45] Procedural remedies have also been proposed by legal philosophers and applied in some cases by courts. See below at section 1.5.

[46] See P.H. Robinson, "Criminal Law Defences: a Systematic Analysis" *Columbia Law Review* (1982) 82(2):199 at p204.

[47] V. Tadros *Criminal Responsibility* (2015) at p103.

[48] *Drury v HM Advocate* 2001

the mental state required for the crime. The case of *R v Smith,*[49] on the other hand, provides a good example of a normative false belief excluding criminal responsibility. In this case, the appellant was a tenant that, with the consent of his landlord, purchased some electrical wiring and speakers and installed them in the conservatory. The tenant ended up causing damage to the equipment when he later removed them. He was cognizant that his reckless action could damage the equipment. Nevertheless, he was unaware that in fixing the items to the wall he had made them fixtures and hence property of the landlord. In this case, the appellant was mindful of section 1(1) of the Criminal Damage Act 1971 that established that "A person who without lawful excuse destroys or damages any property belonging to another […] or being reckless as to whether any such property belongs to another shall be guilty of an offence". However, he was mistaken about the extension of the legal concept "belonging to another". The trial judge, considered at first instance that the appellant´s false belief about the transferred consequences of fixing the equipment was a mistake of law, and subsequently irrelevant. Later, the Court of Appeal quashed the conviction holding that his false belief about ownership prevented the appellant forming the relevant *mens rea* requirement for the crime.

Of course, even where a person is exonerated of a crime when an essential element is not satisfied, they could nevertheless be convicted of an alternative crime if they were, for example, careless or reckless in the evaluation of the risk taken. For example, in the Scottish case *HMA v Williamina Sutherland,*[50] the court discharged the accused of murder but held them guilty of culpable homicide for folding up a bed unaware that a child was then sleeping in it. The main argument of the court was that the accused "did not give the thought she ought to have done before folding up the bed" [51].

Additionally, this traditional solution,[52] founded on the negation of the *mens rea* element, *prima facie* appears to operate appropriately for false beliefs about factual elements required in the descriptions of some crimes. The *a priori* reasoning for the suitability of "failure of proof" defences in cases of factual mistake, resides in the

[49] (1974) QB 354
[50] (1856) 2 Irv. 455
[51] Ibd at 456
[52] A detailed account of the current controversial approach towards error of fact will be provided in chapter VI when an account of false beliefs about brute facts will be presented. Particular attention will be given to two topics related with error of fact: "honest and reasonable belief" about consent; and statutory rape or, more generally, strict liability offences as to age (under 13)

"inexorable logic"[53] that a false belief about a definitional element of a crime (*actus reus*) precludes foresight or intention to commit the crime. The crime so defined, is not committed because the accused lacks the guilty state of mind (*mens rea*) that criminal liability requires.[54] However, even this apparently settled area nevertheless encounters difficulties concerning the controversial subjective/objective *mens rea* test. In the case *B (A minor) v Director of Public Prosecutions*[55] the court decided that in order to convict an accused under the Indecency with Children Act 1960, the prosecution had the burden of proving the absence of a genuine belief in the accused that the victim was over the age of 14. In this case the accused was a 15-year-old boy who attempted to coerce a 13-year-old into oral sex. At trial he argued that he honestly believed that the girl was over 14 and tried to apply the defence of mistake of fact. On appeal, the House of Lords stated that *mens rea* was always to be regarded as an essential element of a crime unless Parliament indicated the contrary. Thus, it was necessary for the prosecution to prove the absence of a genuine belief held by the accused, which did not have to be on reasonable grounds, that the girl was over 14. In some areas statutory provisions, creating offences of strict liability, have resolved to fix the issue. For example, section 5 of the Sexual Offences Act 2003[56] creates a strict liability offence of intercourse with a child under the age of 13. But the recent decision in the Scottish case *HMA v Daniel Cieslack*[57] highlights that statutory outcomes could be disproportionate or unfair and, as a result, inapplicable. In this case, to be discussed again below in chapter 5, the High Court in Glasgow took the decision not to sentence, and instead discharge absolutely, a 19-year-old boy who plead guilty of raping a girl under the age of 13. Thus, the current solutions to errors of fact about a definitional element of an offence range from conviction to acquittal through absolute discharge, without a consistent principled framework. In any case, the current solution, based on *mens rea* negation, ignores what is key in cases of false belief: the epistemic position of the accused. That is, whether or not the citizen knew or should have known of the existence of any factual elements in his action that resembled the description of a criminal offence.

Contrariwise, in relation to false normative beliefs an outcome focused on whether

[53] See *DDP v Morgan* (1976) AC 182 at p214, where the inexorable logic that the accused should be acquitted even if the mistake was unreasonable was defended by Lord Hailsham.

[54] An exception to this rule could be crimes where recklessness can constitute the *mens rea*, or strict liability offences.

[55](2000) 1ALL ER 833

[56] Section 18 Sexual Offences Act 2009 uses similar terms to criminalize sexual activities with children under 13

[57] HMA-v-Daniel-Cieslak Unreported 17 Mach 2017

the belief negates *mens rea* is manifestly unjust[58]. The main reasons for its failure is that in common law jurisdictions,[59] knowledge about the illegality of the act or awareness that the conduct was contrary to the criminal law,[60] is not part of the *mens rea* element. In these jurisdictions, courts and legislators alike have categorically proclaimed that the state of knowledge of the citizen is irrelevant for his criminal responsibility. As Justice Brennan emphatically proclaimed in *United States v Freed*, *mens rea* "[…] does not require knowledge that the act is illegal, wrong or blameworthy".[61] The consequences of this restrictive doctrine is that ignorance of the law only excuses when it negates a fault element. This is, for example, the position proclaimed in the draft English Criminal Law Code when it provides that "ignorance or mistake as to matter of law does not affect liability to conviction except… (b) where it negatives the fault element for the offence". In similar terms, the US Model Penal Code in section 2.02 (9) establishes that "[n]either knowledge nor recklessness nor negligence as to whether a conduct constitutes an offence or as to the existence, meaning or application of the law determining the elements of an offence is an element of the offence, unless the definition of the offence or the Code so provides". Though section 2.02 does not mention explicitly the *mens rea* requirement, the provision emphasizes that knowledge is not part of the mental element of an offence unless the definition of the offence incorporates clauses like " knowing it was forbidden" or "knowing it was a crime". When a clause of this kind is included in the definition of the crime, only an accused with knowledge of the illegality of his conduct can be said to possess the necessary *mens rea* to perpetrate the crime. However, as clauses of this kind are rarely stipulated in the *actus reus* of offences, those citizens who are mistaken about whether their conduct is criminal are nevertheless regarded as possessing the *mens rea* required for the crime.[62]

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[58] As rational creatures we can only be held criminally responsible by virtue of our capacity to respond and to be guided by reasons. Citizens can be guided *only* by criminal laws available to them in their deliberation process. Therefore, to attribute the same level of culpability to the citizen who is aware of the criminal laws as to those who, acting under ignorance, are unable to take the law as a reason for action, is manifestly unfair.

[59] Curiously, a debate about whether knowledge of the illegality of the conduct is part of the mental state (*dolo*) or not, has been at the heart of the concept of crime in continental jurisdictions. Where for the defenders of the "*dolo* theory" the knowledge about the illegality resides in the *rechtswidrigkeit* (second element in the tripartite structure of a crime) for the defenders of the "culpability theory", knowledge resides in the *schuld*; the third element.

[60] Civil Law jurisdictions recognize that the mental element "dolo" implies both, intention and knowledge. See G. Artz "Ignorance or mistake of law" *American Journal of Comparative Law* (1976) 24:646-679; R. Yungs "Mistake of Law in Germany-Opening up Pandora's Box" *J.C.L.* (2000) 64:339-344; M.E. Badar "*Mens rea* –Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals" *International Criminal Law Review* (2005) 203-246.

[61] 401 US 601, 612 (1971)

[62] Law Commission N 177 *A Criminal Code for England and Wales* (1989) cl 21

The same rule has been set out in case law. As a result, the maxim *ignorance iuris neminem excusat* has become a widespread totemic mantra. An extended rule accepted among common law jurisdictions, it is well encapsulated in the words of Lord Bridgewhen when he affirms: "The principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable".[63] Indeed, if belief that one is breaking the law is rarely an element of the *mens rea*, the first obvious drawback is that mistakes or false beliefs about the illegality of the conduct hardly excuses. But a solution based on the *mens rea* element also raises other unresolved puzzling structural questions: when does an element (factual or legal) negate *mens rea*? Which normative or legal elements do negate *mens rea*? How should we segregate legal from factual elements in the definition of a crime? Is a specific clause in the definition of an offence mandatory to excuse the legally mistaken citizen as the Model Penal Code provides? Or, as it was held in *Smith*, is it enough that a false belief about a legal element negates the intention required in the crime?

The difficulty in answering these questions resides first in ascertaining precisely *when* the false belief negates the *mens rea* required in a particular crime. In those offences where the statutory provision contains a particular clause identifying which element requires knowledge, the solution is clear: only when the citizen is ignorant of that particular element will they be excused. As mentioned above, in the Model Penal Code only those offences in which the *actus reus* provides a clause of the kind "knowing it is illegal" can a citizen plead a lack of the required *mens rea*. On the other hand, if no clause exists then, under the conventional principles of *mens rea* suggested in *Smith*, a mistake or false normative belief only negates *mens rea* in relation to an element of the *actus reus* when the law requires the existence of that particular element in the offence definition. This was the main argument excusing Smith. His belief that the property was his own prevented him from possessing the required intention or recklessness as to the particular element "belonging to another", required in the *actus reus*. Thus, only in those crimes where the law requires *mens rea* for a specific definitional element can a false belief about it be used as a defence. The problem with this approach is that the definition of any crime is a compendium of normative (and factual) statements/elements, and it is not always crystal clear which particular element, if mistaken, could negate intention.

[63] *Grant v Borg* (1982) 2 All ER 257 at p263

This standard focus on *mens rea* not only offers difficulties about *when* the state of mind is negated or absent, but also presents the challenge of distinguishing legal elements from factual ones as Kadish's classical hypothetical case illustrates.[64] In this case, the hypothetical Mr. Law and Mr. Fact each wrongly believe they are breaking the law by going hunting on October 15. Mr. Law is wrong because he believes that the hunting season doesn't start until the first of November when it actually began on the first of October. Mr. Fact is wrong because he looked at the wrong page on the calendar and believes it is September; he knows that hunting season begins on October 1. Alexander, for example, argues that "[…] all legal prohibitions consist of facts—such as, that this legislative body passed this law that contains these words that have this intended meaning– and that because all mistakes of fact are also mistakes about whether the law prohibits a particular token of conduct, all mistakes of law could be looked at as mistakes of fact, and vice versa".[65] Others, like Simonds[66] and Westen,[67] defend that such a distinction is feasible. In any case, a closer look at the definition of any crime reveals that the *actus reus* is a compilation of factual and normative elements which are often not easy to isolate and classify. For example, section 1(1) of the Criminal Damage Act 1971, referred to above, establishes that "A person who without lawful excuse destroys or damages any property *belonging to another* […]". It might appear settled that "belonging to another*"* is a normative element, but is it equally certain that the concept of person is a normative concept as well? In some ways all the elements present in the definition of a crime are normative. Even the more empirical or descriptive elements of the *actus reus* are impregnated with some form of legal nuance. So, not only is it difficult to ascertain which normative elements are relevant to *mens rea*, it is equally difficult to distinguish factual elements from legal ones. More about this distinction will be provided later in chapter 4.

To constrain the number of legal elements present in the *actus reus* that could negate the *mens rea* requirement, courts have introduced imaginative headings like 'error of civil law' or 'claim of right'. The former encapsulates those relevant circumstances related to forbidden actions belonging to the civil law, like "property belonging to another"

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[64] S. Kadish and S. Schulhofer *Criminal Law and its Processes* (2001) at p599

[65] L. Alexander "Facts, Law, Exculpations, and Inculpation: Comments on Simons" *Criminal Law and Philosophy* (2009) 3:243

[66] K. W. Simons "Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction" *Criminal Law and Philosophy* (2009) 3:213

[67] P. K. Westen "Impossibility Attempts: A Speculative Thesis" *Ohio State Journal of Criminal Law* (2008) 5:523–565

or "the status of being married".[68] When the definition of a crime includes normative elements regulated in the civil law and the citizen is mistaken about its scope, if the element negates the *men rea* requirement, the citizen is exculpated. A "claim of right", on the other hand, is raised where a person holds an honest belief of legal entitlement. It usually applies in relation to property offences where the mistake negates the fault element. It is explicitly excluded as a possible defence in those offences where force is used.[69] Thus, for example, the citizen who honestly believes that he is entitled to retain the property of his debtor (when he is not) could plead such an error of law defence, based on his mistaken 'claim of right'. Obviously, the extent of when a claim of right can be used is limited by the nature of the crime, and thus it may be used as a defence to theft but not, for example, violent crimes like assault.

These imaginative exceptions have the advantage of corresponding with the predisposition of criminal courts generally for being more lenient with civil mistakes than criminal ones. It is probably for that reason that these standards, although lacking solid principled or theoretical arguments, have been historically successful among criminal courts: probably because they offer an apparent fair solution to the case in front of them. However, the fact is that the definition of a crime often requires references to other sectors of the legal system (civil, administrative…). In fact, a definition of an offence could include a description of any concept incorporated in its definition (*regressus ad infinitum*). Therefore, to make the existence of the *mens rea* element dependent on the way or manner the legal prohibition was regulated or clarified by the lawmaker seems inconsistent, ambiguous and indefensible.

In fact, the courts themselves have been erratic in the application of these headings or standards. In *Morrisette v United States*[70] the defence of error of law was accepted. In this case, a scrap metal dealer removed apparently abandoned bomb casings from a government bombing range. The scrap dealer sold the scrap material and later was charged with knowingly converting government property (an obvious mistake of civil law). The accused claimed that he believed the casings were abandoned. The Supreme Court held that the accused must be proven to have had knowledge of the facts that made the conversion a crime: in other words, they required knowledge or awareness that the property was not abandoned by its owner. Justice Jackson, discussing the issue in terms of

[68] See *Tolson* (1889) 23 QBD 168
[69] See Australian Criminal Code ss 9.5(3)
[70] 342 US 246,247 (1952)

mens rea, reaffirmed the importance of intent in Anglo American criminal law emphasising that a crime is "constituted only from concurrence of an evil-meaning mind and evil-doing hand*"*.[71] Thus, the absence of an evil-meaning mind should result in the absence of a crime. However, in *Cooper v Simmonds*[72] the false belief of a boy that the death of his master relieved him from the obligations of his apprenticeship (clearly a civil law mistake) did not exculpate him from the crime of unlawfully absenting himself from his apprenticeship.

1.3 Traditional rationales to justify the irrelevance of normative false beliefs[73]

Regardless of the manifest inequality and unfairness created by treating equally those who break the law aware of a prohibition and those who break the law unknowingly, those citizens who act with false normative beliefs are not granted a defence if criminal intention is not affected. This understanding is summarized in the aforementioned totemic maxim "*ignorantia iuris neminem excusat"*, considered to be a fundamental principle of common law jurisdictions. Numerous justifications have historically been provided in defence of the irrelevance of the citizen's knowledge about his legal position[74] as grounds for a defence. The most extensive, oldest and influential argument to justify this rule rests in the presumption of universal knowledge of the law. This argument has been defended in common law jurisdictions for centuries[75] and was categorically defended by Blackstone in the following terms: "every person of discretion […] is bound and presumed to know the law".[76] The foundation for this argument lies in the affirmation of the affinity and correspondence between morality (moral wrongs) and criminal law. For the promoters of this presumption, law reflects the mores of the community and thus it should be presumed that its citizens know what the law forbids and allows within their jurisdiction. This presumption of knowledge becomes a *citizenship duty to know the law* which presupposes at least negligence in the citizen if unfulfilled. However, the doctrine of universal knowledge of the law has been criticised since its inception at the end of the nineteen-century by both theorists and judges. John Austin described the presumption of universal

[71] 342 US 246 (1952)
[72] (1862) 26 JP 486
[73] For an exhaustive historical analysis see D. Husak *Ignorance of Law: A Philosophical Inquiry* (2016) at p69 ss
[74] See C. Ronald "Ignorance of the Law: A Maxim Re-examined" *WM & Mary L Rev* (1976) 17:671, p685. L. Hall and S.J. Seligman "Mistake of Law and Mens Rea*" U. Chi. L. Rev*.(1941) 8:648-651
[75] See M. Hale *Pleas of The Crown* 42 (1680); In Scottish tradition see Hume, I , 25
[76] W. Blackstone *Commentaries on the Laws of England* (1769) Book 4, Chapter 2

knowledge as *"*notoriously and ridiculously false*"*,[77] and the Judge J. Fitzjames suggested that the presumption sounded like "a forged release to a forged bond*"*.[78]Commentators of the first half of the twentieth-century have also criticised the rule, proclaiming the presumption as "indefensible as a statement of fact*"*[79] or simply "absurd".[80] However, contemporary scholars, like the influential Ashworth, have defended the argument that citizens have a (non absolute) duty to know the law.[81] An extensive critical (and alternative) approach to this purported *duty to know the law* will be provided at the end of this chapter.

Another unpersuasive, utilitarian justification for the irrelevance of false beliefs was introduced by Blackstone,[82] reaffirmed by Holmes[83] and ratified by Perkins: [84]the maxim promotes deterrence and encourages knowledge of the law among citizens. According to Holmes admitting the defence of *ignorantia iuris* "would encourage ignorance where the law maker has determined to make man know and obey*"*[85] However, these arguments, as Husak points out, could be "marshalled against any excuse, each of which can be thought to erode the deterrent efficacy of the penal law*"*.[86] Indeed, the conviction of blameless citizens for the instrumental reason of increasing deterrence would contravene the Kantian "end-in-itself" categorical imperative not to treat human beings as a means to an end, but rather as an end in themselves.[87]

Professor Austin introduced another new procedural and consequentialist justification to support the rationale of the rule: the difficulty of proof. Ascertaining a citizen's knowledge or ignorance would involve courts investigating and solving insoluble and impracticable problems.[88] The objection of Professor Austin highlighted the obvious problems inherent in interpreting the knowledge of the law of the citizen in the moment of action. The weak theoretical foundation of this argument confronts the strength of its

[77] J. Austin *Lectures in Jurisprudence* (1885) at p482
[78] J. Fitzjames *History of Criminal Law in England* (1883) p95
[79] L. Hall and S.J. Seligman "Mistake of Law and Mens Rea*" U. Chi. L. Rev.* (1941) 8648-51 at 646
[80] E. Keedy "Ignorance and Mistake in Criminal Law" *Harvard Law Review* (1908) 22(75):80
[81] See A. Ashworth and J Horder *Principles of criminal law* (2013) at p220. Also A. Ashworth "Ignorance of the Criminal law and Duties to Avoid it" *MLR* (2011) 74:1; R. Goodin "An Epistemic Case for Legal Moralism" *Oxford Journal of Legal Studies*. (2010) 30:615
[82] W. Blackstone *Commentaries* (1769) pp45-46
[83] O. Holmes *The Common Law* (1881) 79, 144
[84] M. Perkins "Ignorance and Mistake in Crimininal Law" *U. PA. L. REV.* (1939) 88(35):40-41
[85] O. Holmes *The Common Law* (1881) at p48
[86] D.Husak *Ignorance of Law: A philosophical Inquiry* (2016) at p78
[87] I. Kant *Groundwork of Metaphysics of Morals* (2007) at p90
[88] J. Austin *Lectures on Jurisprudence* (1869) p498-500. See also L. Hall and S.J. Seligman "Mistake of Law and Mens Rea" *U. Chi. L. Rev.* (1941) 8:648-51 at p647

practicality. Ignorance is no more or less difficult to prove than other concepts, as for example error of fact. Holmes disproved this proof/procedural objection asserting "If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try … Now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than the many questions which are gone into ".[89] Facilitating this procedural issue raised by Austin, Holmes proposed a shift in the burden of proof: "The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law-breaker". Nevertheless, the fear that an exculpatory ignorance of the law defence could place the "administration of justice under arrest"[90] explains the firm defence of the maxim that judges have maintained, regardless of its arbitrariness and unfairness.

Finally, it is relevant to point out that different approaches towards the principle of legality have produced divergent outcomes towards the justification of the maxim. Hall, for example, argues that the introduction of the defence would contravene the legality principle. According to this argument, if the defence were admitted, "whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law was thus and so, […] but such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality".[91] In contrast, Ashworth defends the introduction of a substantive defence of ignorance of the law, claiming, "[…] the element of notice or fair warning is seen as crucial to criminal liability".[92] This adequate argument supports, for example, the reason retroactivity is a salient principle stemming from the legality principle, because an accused cannot be convicted for conduct that was not a crime at the time the action was performed. A similar argument has been defended by Meese and Larkin who pointed out that "the government must supply everyone with 'fair notice' of forbidden conduct before someone can be criminally punished for having committed it".[93] However, the emphasis by Ashworth and Meese (as well as others like Gardner)[94] on the importance "not to be ambushed" by the law of fair notice in the attribution of criminal responsibility could nevertheless be short-sighted. The relevance of the legality principle here is not about the unfairness of being punished

[89] O. Holmes *The Common Law* (1881) at p45
[90] J. Austin *Lectures on Jurisprudence* (1869); L. Hall and S.J. Seligman "Mistake of Law and Mens Rea*" U. Chi. L. Rev*. 8:648-51 (1941) at p483
[91] J. Hall "Ignorance and Mistake in Criminal Law" *Indiana Law Journal* (1957) 33:1-44 at p19
[92] A. Ashworth "Ignorance of Criminal Law and Duties to Avoid it" *Modern Law Review* (2011) 74(1):1-26
[93] E. Meese and P. Larking "Reconsidering the Mistake of Law Defence" *Journal of Criminal Law and Criminology*. (2012) 102(3):725-784 at p763
[94] J. Gardner "*Introduction*" in H.L.A. Hart *Punishment and Responsibility* (2008)

without notice or warning. The significance here (and connection with the non-retroactivity principle) comes from the fact that only citizens who have been warned or informed about the illegality of particular conduct can take the prohibition or mandate of the legal norm into consideration in their deliberation process before acting. More about this argument will be provided in the following chapters.[95]

1.4 False normative belief as a substantive defence.

The restrictive excusatory effects (in policy terms) of the recognition of knowledge of criminal law as part of the *mens rea,* has made it necessary to identify other exculpatory principles, in terms of fairness or justice to the accused, to mitigate the severity and draconian consequences such an approach brings. For centuries, the tough rule was strictly applied, irrespective of how reasonable or even feasible it was for the citizen to know that their conduct was forbidden by the criminal law. In *Esop*[96], for example, an ottoman native was charged and convicted with the sexual offence of buggery committed on board of an English ship. It was irrelevant for the conviction that the conduct was not an offence in his own country and, being a foreigner, he had no reasons to think that English criminal law would forbid this kind of sexual conduct. Arguments about fair warning have also been regularly ignored. For example, pleas of ignorance of a newly passed statute breached while the accused was on high seas and beyond communication with England, rendering it impossible that any notice of the statute's passing could have reached the vessel, have been systematically disallowed.[97]

As pointed out above, some statutes include a defence of ignorance of law within their wording. In these cases, the lawmaker expressly guarantees that criminal responsibility cannot be attributed to the citizen that held false normative beliefs in the moment of action. However, this legislative technique of requiring express awareness or knowledge of the law in some crimes and not in others is inconclusive and perhaps unfair. It seems that the rationale of such drafting recourses responds more to legislative caprice than to substantial, principled, theoretical arguments. Other legislative solutions have been offered, for example, by the Model Penal Code[98] or the Statutory Instruments Act 1964[99] in cases of poor warning or notice to the citizen. Defences grounded in this legislative

[95] See chapter 2 and 3 of this thesis
[96] *R v Esop* (1386) 7 C&P 456
[97] *R v Bailey* (1800) Russ & Ry 1
[98] s 2.04
[99] s 3 (2)

technique apply in two conceptually different fields. The first refers to those cases where a statutory instrument or statutory norm has not been appropriately publicised or otherwise reasonably made available before the alleged conduct took place. The second applies in situations of reliance on an erroneous official statement about the law. More about these two exceptions to the irrelevance of normative mistakes will be said in the next section.

Legal philosophers, convinced that capricious drafting or legislative techniques cannot provide a principled solution to the severity that results from an implacable rule that excludes excusatory effect for false normative beliefs, have recently attempted to find legal and policy arguments to support an affirmative case for a general defence of *excusable* ignorance of the la[100] Furthermore, the process of over-criminalization and the proliferation of regulatory law (also known as *mala prohibita)* compel scholars and courts to provide a fair and workable substantive defence. Two lines of argument have been proposed by legal theorists to allow the accused to raise a mistake of law substantive defence (excuse). Ashworth in the United Kingdom and Meese and Larkin in the United States lead the first line of thought founded in the principle of legality. A second one, resembling the German "culpability theory", is proposed by Husak modelling a concept of "gradual" culpability.

Thus, as mentioned above, legal philosophers and courts have attempted to find arguments to support and defend the case for a substantive defence of mistake or ignorance of the law. The first proposal that provides an excuse to citizens who act unaware of the illegality of their conduct, grounds its argument in the principle of legality. More specifically, the foundations of this theory headed by Ashworth rests on three pillars related to this principle: first, a purported "duty to know the law" or to take reasonable steps to discover the law;[101] secondly, the "void for vagueness doctrine" and finally the

[100] A.T.H. Smiths "Error and Mistake of Law in Anglo-American Criminal Law" *Common Law World Review* (1985) 14:3-32; P. Matthews "Ignorance of the Law is not Excuse?" *L.S.* (1983) 3:174-192; D. O'Connor "Mistake and Ignorance in Criminal Cases" *M.L.R.* (1976) 32:644-662; B.R. Grace "Ignorance and Mistake in the Criminal Law" *Columbia Law Review* (1986) 86:1932-1416; D. Husak "Ignorance of Law and Duties of Citizens" *L.S.* (1994) 14:105-115; D. Husak and A. von Hirsch "Culpability and Mistake of Law" in *Action and Value in Criminal Law* (S. Shute, J, Gardner and J. Horder (eds) (1996) pp157-174. D. Husak "Mistake of Law and Culpability" *Criminal Law and Philosophy* (2010) 4(2):135-159. D. Husak *"Ignorance of law: A philosophical inquiry"* (2016). A. Ashworth "Ignorance of the criminal law, and duties to avoid it" *Modern Law Review* (2011) 74(1):1-26. E. Meese and P. Larking "Reconsidering the Mistake of Law Defence" *Journal of Criminal Law and Criminology* (2012) 102(3):725-784; R.G Singer "The Proposed Duty to Inquiry as Affected by Recent Criminal Law Decisions in United States Supreme Court" *Buffalo criminal Law Review* (1999-2000) 3:701-754

[101] See A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" *Modern Law Review* (2011) 74:1; A. Ashworth *Principles of Criminal Law* (1991) at pp220-221

"fair notice principle". The first pillar affirms that we should expect citizens to make a reasonable effort to know the law. Thus, it is correct and consistent with the principle of legality to impose a duty in the citizenship to know the law.[102] This argument (which will be analytically criticised later in this chapter) corresponds with the presumption of universal knowledge of the law defended by Blackstone. Ashworth, a defender of this purported duty to know the law, suggests however that this duty should not be absolute for two reasons. Firstly, the lawmaker needs to have flexible standards of legality[103] and as result the law sometimes needs to be uncertain. The span of this standard is left to the judges *a posteriori* criteria, so the citizen only has to be aware of the practical scope of the norm, employing a "reasonably foreseeable test". Secondly, Ashworth affirms that the duty should not be absolute because the state sometimes does not live up to its obligation to make a new criminal norm knowable to the public.[104] In these cases, some exceptions to the duty should be provided to preserve the respect for individual autonomy; the defence would be one of them.

The counterpart of the duty to know the law doctrine, as mentioned above, implies that the state has also a duty to make the criminal law reasonably accessible, certain and prospective. This duty finds its operative force in the other two pillars, the "void for vagueness" doctrine and the "fair notice" principle illustrated above. The legality principle recognized that the criminal law couldn't be retroactive. A criminal norm enacted after the performance of previously legal conduct cannot serve as a foundation for criminal punishment because the citizen needs to understand clearly what the law expects from him. Founded on this argument, a pre-existing criminal norm cannot be the basis for punishment if the citizen cannot understand clearly what the norm prohibits or permits. Criminal law cannot be as ambiguous or vague as to prevent the citizen from ascertaining the boundaries between prohibited and permitted. This void for vagueness doctrine can clearly be equated with the due process doctrine in the American case *Connally v Gen. Constructio. Co,*[105] when it was held that a criminal norm " […] which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process". The American Supreme Court later stated that, "to enforce such a vague statute would be like sanctioning

[102] A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" *Modern Law Review* (2011) 74:1 at p5
[103] A. Ashworth *Principles of criminal law* (1991) at pp220-221
[104] Ibd 221
[105] 269 US 385,391 (1926)

the practice of Caligula, who published the law, but it was written in a very small hand, and posted in a corner, so that no one could make a copy of it".[106]

The "void for vagueness" doctrine introduces the third central pillar of this theory to support an excusable defence of mistake of law: the "fair notice" principle. Under retributive grounds, criminal conviction can only be imposed when the state is able to prove the blameworthiness of the accused.[107] This rationale underlines that to do so, the state must supply everyone with fair warning in advance about what is criminally wrong, so that people can plan their lives avoiding criminal conduct. Fair notice has been defended as essential for criminal responsibility by Gardner who emphasizes that "according with the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or built the legal consequences of having violated it … People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, or putting them into conflict with its requirements in such a way as to defeat their expectations and frustrating their plans.[108]

The extension of the principle of legality explained above 'cuts both ways' according with Ashworth. It imposes a duty in citizens to know the law and a counterpart duty on the state to carry out its legislative functions in a prospective, certain and accessible manner in order to provide citizens with the information they need about the ambit of the existing criminal law. The puzzling question to resolve in this theory is establishing when the duty imposed on citizens could undermine their individual autonomy, as well as delimitating what consequences the ignorance should have when a fair warning has not been provided by the state, because citizens should not be automatically excused every time they are not properly warned. The solution according to Ashworth is that ignorance excuses only when reasonable. In this way, the excuse only operates when the state has not sufficiently informed citizens about the way to organize their conduct, avoiding breaking the law but allowing also exceptions to the individual autonomy principle. In similar terms, Meese and Larking[109] claim that the defence would exculpate only when the mistake was reasonable but, for them, reasonableness relates to

[106] *Screws v United States,* 325 US 91,96 (1945)
[107] E. Meese and P. Larking "Reconsidering the Mistake of Law Defence" *Journal of Criminal Law and Criminology* (2012) 102 (3):725-784 at p764
[108] J Gardner "*Introduction*" in H.L.A. Hart *Punishment and Responsibility* (2008)
[109] E. Meese and P. Larking "Reconsidering the mistake of law defence" *Journal of criminal law and criminology* (2012) 102(3):725-784 at p763

morally wrong action (*mala in se* crimes). People may not know of the technical details of such crimes, but they are aware of the general prohibition. As Yochum highlights, "[…] Evil is fundamentally known…. Ignorance that murder is a crime is no excuse…".[110]

Husak defends the second proposal for an excusable defence of ignorance of law. In a paper published in 2010 he was aware that recognizing knowledge of the criminal law as part of the *mens rea* element would be a major departure from the common criminal law tradition. In this work he proposes an exculpatory alternative to mistake of law which explores the relationship between culpability and mistake of fact. He recognized that his theory lacked a principled explanation for his "intuitions". Furthermore, he even recognized that the outcomes of his proposal would be highly impractical and "could prove to be a legislative and prosecutorial nightmare".[111] Nonetheless, he insists that an exculpatory solution for mistake of law should be achieved not by a simple yes-or-no judgement, but by reflecting on the degrees of culpability previously incorporated into the elements of the offence. He presumes that mistakes of fact and of law should be treated symmetrically. Husak starts his argument defining culpability as "the conditions under which persons should be blamed for their wrongful conduct"[112] in a clear presumption that the content of criminal law should conform to morality. After that, he analyses the effective relationship between culpability and mistake of fact in order to deploy and model a parallelism between his theory of culpability and mistake of law. His proposals are peculiar because he attempts to build his arguments on the understanding that mistake of fact is not resolved in the culpability element, but rather by negating *mens rea*. For that reason, mistake of fact is consensually categorized as a failure of proof defence owing to the accused's lack of *mens rea* required in the definition of the crime.

Fleshing out his arguments, Husak suggests that in committing a crime, different degrees of culpability could arise: the defendant may have purposely violated the law, or he knew he was violating the law, or he was reckless, or negligent, or unaware of the risk, or even strictly liable.[113] After identifying these culpable states, he concludes that in order to attribute exculpatory force to error of fact we need to identify: what elements the mistake is about; the level of culpability required to satisfy this element; and the degree of

[110] M.D. Yochum "The death of a Maxim: Ignorance of the Law is no Excuse (Killed by Money, Guns and a Little Sex)" *St Johns's J Leg. Com.* (1999)13:635-636
[111] D. Husak "Mistake of Law and Culpability" *Criminal Law and Philosophy* (2010) 4(2):135-159 at p137
[112] Ibd at p137
[113] Ibd at p145

culpability involved in the mistake.[114] Finally, he proposes that mistake of law should be modelled and structured reflecting this archetype. What makes Husak's theory highly impractical is that the exculpatory significance of ignorance of law must be incorporated into the elements of offences. He stresses that it is not about multiplying the number of offences, "but decreasing the severity of the punishment imposed on defendants who commit crimes with lower degrees of culpability about their awareness of the wrongdoing". [115] This solution would involve changes to the substantive law to reflect judgements of relative or gradual levels of culpability. Therefore, says Husak, for each type of mistake the legislature should modify (or create additional offences) "to reflect the degree to which different kinds of offenders are culpable".[116]

Husak has recently published a monograph about error of law.[117] In this book, most of his initial arguments have now been modified. He now defends the German approach that the "*mens rea* of criminal offences should be constructed to require not only knowledge of the relevant facts but also knowledge of the applicable law".[118] His argument rests squarely on the retributivist tradition and for that reason the backbone of his thesis is based on his account of moral responsibility. As a result, when it comes to evaluating how harshly a citizen who acts in ignorance of the law should be punished, what is most relevant according to Husak[119] is not whether or not the citizen knows the law but rather if he was unaware of the fact that the conduct was morally wrong. Another relevant argument in Husak's new book is his claim that criminal law should treat ignorance of law and ignorance of fact symmetrically. In fact, Husak proposes replicating the rules and doctrines that apply to error of fact to mistake of law as well. Thus, the criminal law would no longer have difficulty handling or coping with the puzzling question of whether a given mistake needs to be categorized as error of fact or law. Five of the six chapters of Husak's book develop the argument that we "are responsible agents by virtue of our ability to respond to moral reason."[120] As a result, we can be responsible (blameworthy) only when we intentionally disregard the moral reasons against acting in the way we do. He acknowledges but contests the modern account of moral responsibility recently

[114] Ibd at p146
[115] Ibd at 156
[116] Ibd at 157
[117] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016)
[118] Ibd at p2
[119] Ibd at p31
[120] ibd at p140

proposed by philosophers who, like Zimmerman[121] and Rosen,[122] base their position on a "quality of will" argument of moral responsibility.[123] These philosophers defend the idea that a citizen is responsible not when she acts against her judgment of what morality requires but rather when her action expresses an attitude or judgement that gives insufficient weight to moral reasons. One of the consequences of Husak´s account of moral responsibility is that a terrorist who willingly kills innocent people while mistakenly believing that killing innocent people is morally correct should be excused.[124]

But beyond this "Achilles heel"[125] of his theory of moral responsibility that is recognized by Husak himself several times,[126] another weakness of his argument is his claim that mistake of law is a surrogate for mistake of morality. He argues, "[…] the true normative basis of exculpation is ignorance of the morality underlying law, and not ignorance of law itself".[127] This proposal comes from his overall conception of statutory law as a surrogate of morality.[128] He contends that the main reason we use legislation is to avoid legal officials remaining uncertain about our moral duties, and because to directly use morality to attribute liability and punishment would be divisive and uncertain. It seems rather inconsistent that a monograph about mistake of law makes such assumptions without an extensive discussion or debate of this central argument in his theory.

1.5 A procedural (rather than substantive) defence for false normative beliefs

A final *specific* category of false normative beliefs is largely recognized in those cases where the citizen mistakenly commits a crime induced by an official or civil servant. This defence is only a solution to the subset of cases where the accused held a false belief after seeking advice about the law, and it has received massive support from commentators.[129] Courts in the common law jurisdiction have also used different

[121] M. Zimmerman *Ignorance and Moral Obligation* (2014)
[122] R. Gideon "Skepticism about Moral Reasons" *Philosophical Perspectives* (2004) 18:295
[123] D. Husak, *Ignorance of law: A philosophical Inquiry* (2016) at p149
[124] ibd at p155 ss. See also p207
[125] Ibd at p271
[126] Ibd at p146
[127] Ibd at p262
[128] Ibd at p258
[129] A. Ashworth "Testing Fidelity to Legal Values" in *Criminal Law Theory: Doctrines of the General Part* (S. Shute and A.P. Simester (eds) (2002) pp299-330; T. White "Reliance on Apparent Authority as a Defence to Criminal Prosecution" *Columbia law Review* (1997) 77:775-809; S.D. Billimarck "Reliance on an Official Interpretation of the Law: the Defense's Appropriate Dimensions" *University of Illinois*

procedural mechanisms[130] to recognize and apply the defence in practice: in Scotland it has been considered a substantive defence.[131] In contrast, the Supreme Court of Canada[132] does not recognize reliance on official advice as a substantive defence but rather as a stay of judicial proceedings. Finally, in English courts[133] it is dealt with as an abuse of process.[134]

The theoretical rationale for this procedural defence is outlined by Ashworth as a purported fidelity to the legal values that form part of a sensible political morality with integrity.[135] It would be unfair to the accused to be tried as a result of misconduct generated by the state. This kind of unfairness would offend the court's sense of justice and propriety.[136] Ashworth offers three arguments for recognizing the claim.[137] The first stresses the reasonableness of the accused's conduct: the state should recognize and value as good and welcome behaviour situations where citizens seek and follow official guidance. The second argument connects the defence with the principles of legality and fair warning as explained in the previous section. The last argument condenses the procedural nature of this claim. When officials of the state endorse or authorize a particular view about the law, it is unfair to later bring a prosecution based on a different approach to that law. In such cases an estoppel defence should prevent the state from prosecuting any citizen who was informed and advised erroneously. For this reason it is considered a procedural defence because in cases of induced official error no prosecution should be allowed.

Other authors, to justify the defence, appeal to the Lockean-Rousseaunian "social contract" argument that imposes rights and obligations on citizens and state alike.[138] The social contract argument implies that both sides ought to fulfil their part of the contract.

Law Review (1993) 565-588; J.Parry "Culpability, Mistake and Official Interpretation of the Law" *American journal of Criminal Law* (1997) 25:1-78

[130] Procedural guidelines have been produced to encourage the Prosecution Services to avoid prosecution in those factual situations where the citizen was officially induced. See *Code for Crown Prosecutors (5th edit), para 5.10 (c)*

[131] *William Roberts v Local Authority of Burgh of Inverness* (1889) 17 R (J) 19

[132] *R v Jorgensen* [1995] 4 S.C.R. 55

[133] In a number of previous cases the defence was ruled out, see *Surrey County Council v Battersby* [1965] 2 Q B 194; *Cambridgeshire and the isle od Ely County Council v Rust* [1972] 1QB 426; *R v Bowsher* [1973] Crim. L. R. 373; *R v Arrowsmith* (1975) 1 QB 678.

[134] *Postermobile v Brent LCB* [1998] Crim. L.R. 435

[135] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" *The Modern Law Review* (2000) 63(5):633-659

[136] A. Powell "Abuse of Process in Criminal Cases" *NZLJ* (2006) at p386

[137] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" *The Modern Law Review* (2000) 63(5):633-659 at p638

[138] M. Briggs "Relocating Officially Induced Error of Law: Fitting the Remedy to the Wrong" *Common Law World Review* (2009) 38:1-26 at p5

The state cannot expect citizens to fulfil their duties if they have not made the criminal law knowable. This claim connects the "fair warning" argument and the principle of individual fairness. Where the citizen has fulfilled their part of the bargain its sounds disproportionately severe to prosecute him for a mistake that the state is responsible for. Denying excusatory consequences to such mistakes would clearly weaken social confidence in the advice that the officials give to the citizens.

As aforementioned, the judicial and legislative responses in common law jurisdictions to such a defence have tended to approach this issue differently from the theoretical argument just discussed. The big exception is the Model Penal Code that provides for a partial defence of officially induced error of law.[139] The defence is available when a citizen relies on advice or information which presents an erroneous statement of the law, provided by a body or official responsible for the interpretation or enforcement of the law. The Code only requires that the reliance should be reasonable. In England, the court responses have been contradictory not only in the extension of the defence but about its effects. In *Postermobile v Brent London Borough Council*,[140] a prosecution for displaying artefacts without planning consent, the Division Court held that advice provided by an "inexperienced" official should have the effect of staying the proceedings. The argument was that citizens should be able to rely on the statements provided by officials. The court argued that although the official who provided the advice was probably inexperienced, he was from the planning department and therefore in a position of authority that the accused could rightly rely on their advice. In *Arrowsmith*[141] the accused was charged with endeavouring to seduce a member of Her Majesty's forces (distributing leaflets) from his duty or allegiance to Her Majesty.[142] She defended herself alleging that a letter she had received from the Director of the Public prosecution would have led any reasonable person to believe that the distribution of leaflets did not breach the Incitement to Disaffection 1934 Act. In fact, the Court of Appeal rejected that the excusatory effects of induced official error should result in the accused's acquittal. Instead, Lawton LJ recommended that the induced error should be relevant to sentence, suggesting a mitigation solution for an officially induced error of law.

[139] S 2.04 (3) b
[140] *Postermobile v Brent LBC* (1998) Crim. L.R. 435
[141] *R v Arrowsmith* (1975) 1 QB 678
[142] She was prosecuted under the Incitement to Disaffection Act 1934

The high Court in Australia, in *Ostrowski v Palmer*,[143] has recently rejected the defence of officially induced error. In circumstances where a fisherman was provided with manifestly faulty information about the fishing of rock lobster by the responsible state government department, the court nevertheless resolved that recognizing the defence would undermine the rule enacted in section 22 of the Criminal Code that determines that ignorance of the law is no excuse. The cited section provides that ignorance of the law cannot afford any excuse that would constitute an offence unless knowledge of the law by an offender is expressly declared to be an element of the offence. In New Zealand, the Crimes Act 1961 does not recognize any error of law as a defence. Section 25 of the Act provides that "the fact that an offender is ignorant about the law is not an excuse for any offence committed by him". Nonetheless on a couple of occasions New Zealand courts have shown some flexibility to the harshness of the rule.[144] On other occasions, New Zealand courts have recognized a diffident form of exculpation and recommended discharging the appellant because the police had previously tolerated instances of the activity performed by the accused.[145] In one case, the court *in obiter* recognized that a proper instrument to cope with cases of induced official error could be the doctrine of abuse of process as a result of the way in which officials dealt with the accused prior to charging him.[146]

Finally, it merits mentioning the way the Canadian judiciary has been dealing with officially induced error. On paper, section 19 of the Criminal Code categorically sanctions that ignorance of law is not a statutory defence. Also, Section 8(3) only preserves those common law defences not altered or inconsistent with the criminal code, so ignorance clearly is not one of them. In short, both, common and statutory law provide few options to recognize the excusable effects of *ignorantia iuris*. However, Canadian courts have been very keen and responsive to those cases where the citizen has been mislead by the state. The Supreme Court of Canada and the Ontario Court of Appeal have been receptive to recognising the defence as early as the mid-1980s. The Supreme Court in *MacDugal*[147] and the Ontario Court in *Cancoil Thermal Corporation*[148] allowed the defence when the

[143] *Ostrowski v Palmer* (2004) HCA 30
[144] *McCrae v Buller District Council*, unreported 12 Dec 2005 and *Wilson v Auckland City Council* (2007) DCR 655 at par. 34. See also W.J. Brookbanks "Official Induced Error as a defence to crime" *Crim LJ* 1993 17:381
[145] *Tipple v Police* (1994) 2 NZLR 362; see also *Diriye v Police* unreported, 20 July 2006, HC Auckland, CRI 2006-404-7
[146] *Ministry of Fisheries v New Zealand Wholesale Seafood* (1984) Ltd [2001] DCR 85 at 102
[147] *R v MacDougall* (1982) 142 DLR (3d) 216,SCC.
[148] *R V Cancoil Thermal Corporation and Parkinson* (1986) 27 CCC (3d) 295.

accused had reasonably relied on the erroneous opinion of an official who was responsible for the administration and enforcement of the law. Later, in the mid-1990s the decision held in *Jorgensen*[149] provided a turning point in the recognition of induced error of law in Canada. The court endorsed the arguments highlighted previously by Ashworth theoretically comparing this excuse with entrapment, because in both cases "*the accused has done nothing to entitle him to an acquittal, but the state has done something which disentitled it to a conviction.*[150] This statement in *Jorgensen* was thereafter affirmed in *Levis v Tetreault*.[151] In this case, Bel J ratified Lamer CJC's *obiter* statement and held that officially induced error constituted a legitimate exception to the exclusionary rule that ignorance of law is not defence, on a procedurally similar basis to entrapment and, as a result, the accused would be entitled to a procedural remedy in the form of a stay of proceedings rather than an acquittal.[152]

Despite the above, advice provided by a private lawyer is generally not accepted as a defence.[153] The rationale is based on an extension of the argument that private lawyer's advice would not be enough to stay proceedings as the information has not come from an official. The trend in this field reflects the Model Penal Code that only recognizes the defence when provided by a public officer or body.[154] There is likely a strong reluctance to extend the defence to the advice of private lawyers on the basis of the potential for abuse.[155]

1.6 Critique to the current proposals: burden *versus* duty to know the law

The solutions examined above have been unable to provide a strong case for a fair and principled solution. In fact, the rule that ignorance or mistake of law is not an excuse is now, aside from a few well-known exceptions,[156] fully enshrined in our criminal law. Courts and scholars seeking to create such exceptions have been incapable of isolating

[149] *R v Jorgensen* (1995) 4 SRC 55, SCC
[150] *Ibd* at p37
[151] *Levis (City) v Tetreault*; *Levis (City) v 2629-4470 Quebec Inc.* (2006) 1 SCR 420
[152] Ibd at 25.
[153] See M. Guy-Arye "Reliance on a Lawyer's Mistaken Advice: Should it be an Excuse from Criminal Responsibility?" *American Journal of Criminal Law* (2001-2002) 29:455-480
[154] s 2.04 (3) (b)
[155] M. Guy-Arye "Reliance on a Lawyer's Mistaken Advice: Should it be an Excuse from Criminal Responsibility?" *American Journal of Criminal Law* (2001-2002) 29:455-480 at p466
[156] Another exception to the general rule that ignorance of the law does not excuse has been made where the law is unpublished or was published but inaccessible. This exception, although testimonial, has been granted in Scotland in the case *MacLeod v Hamilton* 1965 S L T 305, that recognized the defence of mistake of law on the basis that the law in question (parking restrictions) had not been adequately publicized.

under which circumstances a false belief about the law should serve as a defence or as a mitigating factor to criminal responsibility.[157] Instead, a set of exceptions have been proposed or applied without questioning the general principle. As shown above, these (often ingenious) unprincipled approaches taken towards the issue have resulted in the court reaching for any legal possibility to provide a solution which delivers a fair response on a case-by-case basis.

The exculpatory consequences of the first solution we examined, based on a failure of proof defence were minimum from a policy point of view. As noted above, a belief that one is breaking the law is rarely an element of the *mens rea*, so false beliefs hardly ever exonerate the accused under this method. Furthermore, identification of normative elements which would negate intention could be problematic. Moving the excusatory effects of false beliefs to the *actus reus* proved just as complex, where it was difficult to segregate normative from factual elements in the description of the crime. We noted that the arbitrary and manifest inequality in policy terms of this restricted defence forced academics and courts to identify other legal fields which might offer a more charitable solution.

The purported general but circumscribed excusable ignorance of law defence proposed by Ashworth and Husak does not provide a principled argument either. Husak himself recognizes that his proposal is highly impractical due to the countless number of changes in the substantive law that his theory requires. Modifying every offence in order to reflect the degree to which different types of offender would be culpable is impracticable. But his most vulnerable argument in the book comes from his claim that "Mistakes of fact and mistakes of morality have the same effect in practical reasoning"[158]. To defend this view, Husak who supports in this book a Scanlonian reasons-responsiveness theory of responsibility[159], holds that defects in reason-responsiveness should be measured by the subjective standards of the agent[160], no matter how mistaken his standards might be. As a result, the agent who does not give reason-given weight to a moral proposition of which he is not aware is as blameless as the agent who fails to respond to a factual proposition he ignores. In asserting that "no rational person can be faulted for failing to respond to a reason he

[157] D. Husak "Ignorance of Law and Duties of Citizens" *L.S.* (1994) 14:105-115 at p105
[158] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016) at p153
[159] See Chapter 4.6 of this thesis.
[160] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016) at p153

is unaware applies to his conduct",[161] Husak endorses the argument that when the agent does the best with the reasons he has, we cannot hold him morally culpable. Only those agents who act against the balance of moral reasons (akatric agents) of which they are aware can be held responsible. As a result, the potential terrorist who willingly kills innocent people mistakenly believing that killing innocent people is morally correct is not responsible.

This subjectivist position, as Yaffe has recently pointed out[162], is manifestly inappropriate and should be substituted by accuracy as the optimal (objective) standard attributing moral responsibility. If an agent gives in his deliberation less reason-given weight to a fact or moral proposition than it actually provides, his mode of transaction with reason is manifestly defective[163]. In fact, excuse of false normative beliefs makes sense only when important aspects of the agent's mode of transaction with reasons are not manifested in the action, although we thought they were. Being unaware of a particular fact, the agent shows that his tendency to add or discount the reason given force of this particular fact is not reflected in his action. Thus, his behaviour is not as culpable as it would have been had the behaviour indeed reflected that. The agent who gives less reason-given weigh to a moral proposition than it actually provides is fully culpable. As will be argued in this thesis, the reason Husak's assertion is criticisable resides in the purported social function of any moral appraisal. Only objective standards can shelter and build social bonds. It is only under an objective standard that social expectations about mutually respectful interactions between people can be evaluated. Therefore, the agent who does not think that killing innocents is criminal is fully culpable because the function of the criminal law is not just to guide agent's conduct but also, to build interpersonal trust, to protect the expectations of other citizens.

A deeper consideration, however, was given to the second proposal of an excusable ignorance of law defence led by Ashworth. First, Ashworth's argument that only reasonable mistakes of law can excuse is purposeless without a proper theoretical discussion of the circumstances under which ignorance will be qualified as 'reasonable': a theoretical discussion that he did not deliver. Furthermore, upholding that reasonableness

[161] Ibs at p152
[162] G. Yaffe "Is Akrasia Necessary for Culpability? On Husak's Ignorance of Law *Criminal law and Philosophy* (2018) 12:341-349
[163] Ibd at p344

depends only on whether the state fulfils its duty to make the law knowable to citizen looks intuitively insufficient. Perhaps there are cases where the law is made accessible but it is nevertheless reasonable to excuse the accused. On the other hand, the procedural defence defended by Ashworth for official reliance cases would exclude trust in private lawyers or academics. The massive number of legal norms in our modern societies make knowing all of them impracticable. For that reason even private lawyers need to specialise to be able to provide accurate information to their clients. Citizens should be encouraged to seek advice from private lawyers or agencies about the current legal framework. To exclude non-official advice from the scope of the defence would undermine the necessary trust that citizens need to have in seeking legal advice. All of the sub-categories of 'reliance on official advice' will be discussed extensively in chapter 7 where the quality of the information that could exonerate the accused will be clarified.

Finally, this chapter contributed to a debate held by Husak and Ashworth about a purported "duty to know the law". Ashworth argues that there is a duty (although not absolute) on each citizen to take reasonable steps to acquaint himself with the criminal law. Originally, he claimed "that it is wrong to be ignorant or mistaken about the law" and for that reason "a person might be (fairly) convicted despite ignorance of law".[164] More recently,[165] Ashworth has fine-tuned his argument, referring to the rule of law principle, by suggesting that the *citizen's duty* to take measures to know the criminal law should be contrasted and balanced against the *state*'s *duty* to adequately announce criminal laws. His explicit recognition of the citizen's duty to know the law is tempered with the appreciation of *reasonable* exceptions. On the other hand, Husak has criticised the defence of such a duty.[166] According to Husak, citizens who act under ignorance breach two distinct moral requirements: a general duty to know the law; and the obligation not to commit a crime. [167] He argues that a duty to know the law does not exist arguing two deficiencies: first that it does not prove that the accused ignorant of the law is in any way blameworthy and secondly because even if some degree of blameworthiness could be established the duty fails to prove that *"*he is blameworthy to the appropriate extent*"*. [168] On the other hand, the argument that will be introduced below differs from both authors and suggests that there is not a *duty*, but rather a *burden* to know the law.

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[164] A. Ashworth "Principles of Criminal Law" (1991) p299
[165] A. Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" *Modern Law Review* (2011) 74-1.
[166] D. Husak "Ignorance of Law and Duties of Citizens" *L.S.* (1994) 14:105-115
[167] Ibd at p109
[168] Ibd at p108

Husak appropriately highlights that Ashworth does not provide an account of the alleged "duty of citizenship".[169] Explanations as to its sources, if it applies equally to all citizens, or the extension of the duty have not been provided. Thus, as the lack of theoretical discussion about the extent of this claimed duty to know the law is remarkably missing in the legal or criminal literature,[170] I shall try to expand on what a supposed duty to know the law would mean in legal terms. Allow me to name this proposition the 'duty to know theory'. Presumably this theory would hold that the requirements of a duty to conform to the law are not satisfied when a citizen only avoids acting for a reason that looks subjectively *prima facie* illegal. Before acting, the citizen has a duty to find out whether or not his action is permitted or prohibited by the law. His doubts, if any, should be resolved by personal deliberation or by searching for information from reliable sources. Therefore, for this theory, it is the omission or transgression of this duty to search for information that makes the citizen responsible and excludes any legal relevance to *ignorance iuris*. This supposed theory is as flawed as any formula that demands a *duty* to search for legal information. Such a duty does not exist alongside a duty to avoid illegal acts and conform according to the law. The duty to avoid illicit conduct is entirely fulfilled when a citizen acts according to the law. The way the citizen has decided to conform is legally irrelevant. He could conform as a result of a thoughtful and meticulous search of legal information or just by chance or blindness if the search for information seems tedious to him.

This leads us to the most inadequate consequence of this supposed theory: the irrelevance of potential information, particularly in the context where such information is manifestly incorrect.[171] In this context, potential information is the evidence of illicitness that the citizen would have achieved if he had searched for advice in a reliable source. According to "the duty to know theory", the transgression of the duty to become informed about the illicitness of conduct makes the citizen criminally responsible. The breach of the duty would be satisfied by a mere request for information, without any consideration for the suitability or correctness of the information that had been achieved from the enquiry. Under this theory, the citizen would be criminally responsible because he breached a purported duty, irrespective of whether or not the information provided could have helped

[169] Ibd at p107
[170] From Blackstone to Ashworth it has been defended but remarkably never properly explained of discussed.
[171] For a Dogmatic German account of hypothetical information see H J. Rudolphi *Unrechtsbewubtsein* Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums (1969) at p194

him to conform to the law using his practical reasoning. This outcome of the theory is fallacious and makes "the duty to know theory" logically indefensible. This is because in those cases where the information relied upon is incorrect, the citizen can neither identify the illegality of his conduct in advance, nor can he conform with the law as his only duty. Therefore, logically, his conduct is not reproachable and the citizen should not be criminally responsible.

The facts of the Scottish case *William Roberts v Local Authority of Burgh of Inverness*[172] serve to explain and expand on this argument. In this case Mr Roberts was the tenant of a farm in Dell of Inshes (in the county of Inverness) and the owner and occupier of a dairy business within the burgh of Inverness. It was his practice, in the conduct of his business as a dairyman, to send his cows from his premises in the burgh of Inverness to his farm in Dell of Inshes during calving time, and bring them back after they had calved. On such occasions, Mr Roberts would apply to Mr Thomson, a veterinary surgeon with authority to grant the licenses required for the removal of cows under the Contagious Diseases (animals) act 1878, for the necessary documents to remove his cows. When Mr Roberts applied again for a declaration form, Mr Thomson informed him that, due to an amalgamation of the local authorities of the county and the burgh, a license was no longer necessary and cows could now be moved without licenses. Neither, the Local Authority, the magistrates of the burgh, the clerk, the Chief constable of the county of Inverness or the police were aware of these contraventions of the regulations. In fact, it was at that time a common practice between dairymen to take their cows into grazing from the burgh to the county district in the mornings and return into the burgh in the evening without licenses. On the 18th July 1889 Mr Roberts moved one milch cow, apparently in good health, although it was later found to be afflicted with pleuro-neumonia, without any license authorizing the removal. He was accused and convicted of an offence against the cited regulation by the Sheriff-substitute. Later it was held on appeal that Mr Roberts had a lawful excuse and his conviction was set aside.

It is beyond doubt that Mr Roberts, in moving the milch cow without license, contravened section 61 of the Contagious Diseases (Animals) Act 1878. What has to be ascertained next is whether Mr Roberts' transgression of the norm was also reproachable or culpable. To do so, it is *only* required to verify whether or not Mr Roberts (*a priori* a

[172] (1889) 17 R (J) 19

loyal law follower but a puzzled or ignorant man in Hart terms[173] who is willing to do what is required) could have contemplated the norm as a reason for action and subsequently conformed to the norm requirement. This verification is totally independent of the fact that he could infringe any purported duty to know the law. At the end, Mr Roberts is a mere selector of reasons. According to both the 'duty to know theory' and the position held in this paper, the decision of the Court of Appeal was correct, but for different reasons. The discrepancy would arise and be apparent in the hypothetical scenario where Mr Roberts had not requested information from a reliable source and, with a false belief about the content of the law, he had contravened the legal norm contained in the cited act. In this hypothetical case, under the "duty to know theory" Mr Roberts should be made criminally responsible because he broke his duty to become informed about the law. On the other hand, his conduct is not reproachable or culpable because the only duty Mr Roberts has is to select the norm as a reason for action and act according to the norm. In this case, even if Mr Roberts had informed himself from a reliable source, he could neither have identified his conduct as anti-normative, nor could he have adapted his conduct accordingly. His conduct is, therefore, not culpable and consequently not to be viewed as criminally responsible.

Conduct is reproachable when a citizen does not conform to the norm when he could. That is, the citizen has recognized and turned the norm into a reason for action. Even though the citizen transgresses a supposed duty to inform himself, from this it cannot be concluded that he could have known the norm and guided his behaviour accordingly. This case is illustrated by those potential cases where the citizen, even informing himself, would not have acknowledged the illegality of his action because the source they relied on was giving the wrong information. The gist of the reproach exists in the opportunity that all rational citizens have to act according to the norm. What would have been reproachable is if Mr Roberts had been given proper, accurate advice; he would have been informed that the movement of cows required a license. A *contrario sensu* the criminal reproach is excluded when Mr Roberts has been informed incorrectly. In this case, neither the citizen could have identified the illicitness of his conduct in advance and, subsequently, nor he could have conformed to the law using his practical reasoning. The verification that the omitted consultation would have pointed the author to the knowledge of the illicitness is a necessary requirement to be criminally responsible.

[173] H.L.A. Hart *The Concept of Law* (1994) at p39

The obvious objection which could be argued by a defender of the duty to know the law would be that a normative link is necessary between the citizen and the acquisition of legal knowledge. Without this, the conduct of any citizen who has the possibility of acquiring knowledge and intentionally omits to become informed would not be culpable. Any dairyman moving cows would argue: "I could have known the law but it was not my duty. My duty is to take the norm into account in my deliberation process before acting and conform according to the norm. Unfortunately I could not take the norm into account in my practical reasoning because the norm was unknown to me". The objection is sound. We need a normative connection between the citizen and the acquirement of legal knowledge. However, the normative link should not be understood in terms of a duty, but as a burden. Burdens, a familiar concept in procedural criminal law, are an imperative established in favour of the citizen obliged by it; it is an obligation that the citizen has with himself. For that reason its fulfilment cannot be required by third parties. Only the citizen in whose favour the burden was established can require its fulfilment - nobody else. Of course, a burden can be left unfulfilled but the legal consequence is that the citizen cannot dissent about the inconvenience thereby caused. In terms of false normative beliefs, the citizen does not have a *duty* but he bears a *burden* to acquire enough knowledge to ascertain that his conduct is in accordance with the legal norm(s). In the hypothetical case where the citizen does not fulfil his duty, the consequence is that he cannot invoke his deficit of knowledge as a defence in order to support his lack of awareness of the law.

In conclusion, an absolute or "reasonable" duty to know the law such as Ashworth defends does not exist. The fundamental test to ascertain whether the citizen is criminally responsible, regardless of his lack of knowledge of the norm, is to assess whether or not the citizen had fulfilled their *burden to know the law*. This is to ask whether the the citizen had a responsibility to acquire knowledge about the legal valuation of his conduct and ignored this burden by neglecting to become informed. Only after that does the citizen become disqualified from pleading that he was incapable of conforming with the law because he ignored the norm. Without transgression of the burden to acquire knowledge about the legality of the conduct it is not possible to attribute criminal responsibility for any anti-normative conduct performed under false beliefs.

In any case, the burden to acquire knowledge is not unlimited or unrestricted otherwise the citizen would always be able to become informed from another source in a *regressus ad infinitum*. In the development of this thesis,[174] the realm and boundaries of the burden will be "normatively" determined.[175] What is relevant at this stage is that only the transgression of the burden to know the law disqualifies the citizen from utilising *ignorantia iuris* to exonerate his anti-normative conduct. Therefore, *a contrario sensu*, once the citizen has fulfilled the burden in the way demanded, *ignorantia iuris* releases the citizen of any purported criminal responsibility. How does this affect the receiving of potential information? How would this affect Mr Roberts if instead of a duty he had a burden to know the law? Apparently, the conclusion is identical: Mr Roberts could not plead a defence since having the burden to inform himself he did not do it. But the difference is made by the application of the *ultra posse nemo obligatur*[176] and *ad impossibilia nemo tenetur*[177] principles. The existence of a burden presupposes the individual possibility of its performance. Therefore, the burden of avoiding mistakes ends, or perhaps does not even start, when the citizen is not able to obtain the correct knowledge. Mr Roberts has *a priori* the burden to become informed about the norms that control the movement of cows. But in the hypothetical case that he did not inform himself and the information had been manifestly incorrect and misleading, as it had been the case, he is qualified to use a defence to release him from criminal responsibility because the law cannot require from him to do (or know) the impossible.

1.7 Conclusion

This chapter has highlighted the patchy and unprincipled solutions that the current law for false normative and factual beliefs provides through the "mistake of law" and "mistake of fact" twofold structure. It has also raised the complications that this binary solution involves due to the difficulty of differentiating between factual and legal/normative elements present in the description of criminal conduct. After introducing the substantive and procedural solutions proposed by courts and scholars alike, this chapter has criticised and disapproved these alternative frameworks. Finally, the chapter has

[174] See chapter 7
[175] Factually it will always be possible to resort to another source.
[176] No one is obligated beyond what he is able to do.
[177] Nobody is obliged to do the impossible.

criticized the purported duty to know the law defended by Ashworth. Instead, the normative connection between the citizen and the acquirement of legal knowledge has been categorized as a burden, one that always implies the individual possibility of its performance. Thus, according with the *ultra posse nemo obligatur* principle, in those cases where it is not possible to access the legal knowledge about the illegality of the conduct, the burden cannot operate and consequently the citizen should be discharged.

The conclusion, if the position held in this chapter is correct, is that regardless of the contemporary judicial and academic awareness about the deficient, inconclusive and unjust nature of the present law, and irrespective of the unquestionable disposition displayed by renowned legal philosophers and academics to delineate a fair and practical solution for false normative and factual beliefs, the response to this challenge so far has been a fiasco. Instead of producing a principled solution and a set of possible exceptions under which the general principle could be discharged, the doctrinal upshot has been to expand the number of exceptions without challenging the general rule. This state of affairs suggests first that the solution is perhaps not straightforward, but also insinuates that the roots of the problem are more profound than they seem at first sight. Locating a coherent solution perhaps requires revising the current conceptual framework from which the present proposal has been formulated. Also, providing a consistent and principled answer to false beliefs requires rethinking the legitimation and function of the criminal law in modern societies. This will be the aim of the next two chapters. Chapter 2 will scrutinize the dominant conceptual framework, attempting to identify the reasons behind its incapacity to allow a consistent and fair answer to false beliefs to flourish. Thereafter, chapter 3 will explore and defend a fresh conceptual framework that revises the traditional legitimation and functions attributed to criminal law and criminal punishment.

CHAPTER 2

THE NATURE OF THE PROBLEM

2.1 Introduction

After reviewing the range of patchy, inconclusive and unsettled formulas, doctrines, proposals and arguments delivered by courts and legal scholars about false beliefs, the obvious question to put forward is *why* a coherent, principled, convincing and fair solution has been so evasive and problematic. *Why* have generations of eminent scholars, jurists, and judges been unable to provide a consistent and principled answer to this problem when most contemporary commentators are of the view that the false beliefs defence should be wider than it presently is in common law jurisdictions? In short, what makes the attribution of criminal responsibility so tricky in those cases where a direct link between the wrongness of the agent's conduct and her cognizant and informed will is missing?

Some scholars argue that the undeveloped state of affairs is due to the lack or deficiency of research about the topic. Husak blames legal theorists because they have not done the "spadework" necessary to resolve the issue.[178] At the same time, he suggests that the reasons for the failure are methodological. According to Husak, scholars habitually present a range of examples about *ignorance iuris* and, after consulting their moral intuitions, they formulate principles that allegedly justify these intuitions. Husak suggests that these outcomes could be defective because intuitions about the topic are too ambivalent and ambiguous. Thus, the principles formulated to justify our intuitions are only as strong as the judgement on which they rest and, with respect to this topic, they are weak and frail. [179] Nonetheless, the claim that longer and more extensive research produces better outcomes only works if the line of investigation is correct and the starting point is appropriate. Chapter 1 outlined the controversial rationales that have been historically suggested to justify the irrelevance of false normative beliefs. More extensive research

[178] D. Husak "Mistake of Law and Culpability" *Criminal Law and Philosophy* (2010) 4(2): at 142
[179] Ibd

from the same starting point is redundant. The consequentialist perspective of considering *ignorance iuris* within the offences/defences framework through the *mens rea* element has been fruitless: proposals that attempt to consider false normative beliefs as a defence or a negation of *mens rea* have proved to be inconclusive and inadequate. The arguments founded on this conceptual framework are already exhausted and this failure signifies that the problem is in the conceptual framework itself – in the assumptions or baseline where the proposals originate. The search for a principled solution seems to require a fresh perspective towards the criminal law itself and the authentic weight that knowledge of the law certainly has.

Criminal law evolves as with any other social phenomena. Criminal law is at a permanent crossroads between its purpose to provide stability in a society in continuous transformation and being simultaneously a response to change. Without an update on our perspective towards the criminal law, the new challenges that criminal law as social phenomena has to confront will continue to be problematic. This new, required perspective demands more than a methodological change. It requires a new and up-to-date theoretical conceptual framework and a modern understanding of the criminal law since it does not provide the same role and functions today as it did in the Victorian ages. The rest of the chapter is going to examine and reject two conceptual frameworks before moving on to propose a fresh conceptual, institutional framework. We must first explain and revise the *legal moralist* dominant framework, exploring the reasons behind its incapacity to provide a contemporary solution which better fits the purposes of the criminal law in the 21-century in general, and with false beliefs in particular. Then, the *legal positivist* prospective 'guidance view' theory, which upheld that the main function of the law is guidance, not only for officials but also for ordinary people, will be analysed. Once the legal positivist theory has been discussed, the chapter proposes the convenience of a more sociological approach to legal guidance: law seeks to guide and organize the behaviour of individuals in social groups.

This chapter, still focused on false normative beliefs, has five sections. Section 2.2 introduces the dissimilar influence and authority that *legal positivism* and *legal moralism* have in criminal law theory. Section 2.3 explores the position of a wide variety of influential legal moralist commentators and explains why knowledge of the law has historically been peripheral in such accounts of responsibility. For those who support a legal moralist stance, *"*culpable wrongdoing provides a desert-based reason for punishing a

responsible agent".[180] The accused must have engaged in moral wrongdoing to be convicted. Criminal laws within this account are a subsidiary of morality – they do not play any role in the deliberation process of citizens before they act. Thus, if criminal norms do not create any fresh moral obligation to conform to their mandate, neither are they reasons for action, and knowledge of the law or false beliefs about them should be entirely irrelevant. Then, in section 2.4, the legal positivist account of law and its conclusions for knowledge are drawn. The chapter provides a meticulous revision of the most relevant positivist authors and their positions about knowledge. The positivist 'guidance view' is proposed as a sufficient condition for responsibility: we can only be held responsible for behaviour guided by our capacity as rational agents and performed and guided for what we believe to be adequate reasons. Therefore, false beliefs are crucial in the attribution of criminal responsibility. The role played by legal norms in our practical reasoning before action, and its implications for false normative beliefs, are discussed in section 2.5. Section 2.6 argues that the guiding role that law plays in our practical reasoning, defended by legal positivism, does not embrace the idea that law seeks to guide individuals in social groups, thus introducing a sociological account of the law. This part emphasises that we are not only rational but also social agents.

2.2 Legal moralism *versus* legal positivism.

Two divergent intellectual legal traditions subsist historically in legal theory: *legal moralism* and *legal positivism*. Legal positivists proclaim that legal validity is a matter of social fact; a norm is a valid legal rule of a given legal system when it is enacted, practiced and enforced by an appropriate authority. For legal positivist, legal norms are content-independent reasons for action. The main difference between them concerns whether a law must pass a merit-based test in order to be valid (moralist), or whether its mere enactment by a legitimate authority or political institution should be enough to validate it (positivist). In practical terms this translates to whether judges should, in a given case, respect the rule of recognition as a legitimate source of obligation to follow the law, or instead test its validity using moral arguments.

[180] D. Husak "What's Legal about Legal Moralism" *San Diego L. Rev*. (2017) 54:381

In criminal law theory the influence of legal positivism is residual and its proposals are barely developed or taken forward.[181] On the other hand, the legal moralist tradition has historically found a fertile field in criminal phenomenon to flourish, where theorists have defended a purported incontestable convergence between criminal law and morality. More recently, the legal moralism tradition has found in the so-called "criminal philosophers" a new revival. This heterogeneous group of philosophers understands criminal law as a subspecies of moral theory focused on moral wrong[182] or different levels of wrongdoing[183] rather than in legal norms. The concept of wrong (and desert) becomes central to both the process of criminalization and the internal structure of the criminal law. In this context, criminal norms have the subordinate and secondary function to declare the wrongfulness of the prohibited conduct.[184]According to this approach, legality (or the principle of legality itself) is simply an advantageous tool that serves to avoid the ambiguity and insecurity that direct appeals to morality would imply. These legal moralistic arguments have been recently summarized by Husak when he asserts, "[…] on the planet we inhabit, we have ample reason to employ surrogate for morality. This surrogate, of course, is statutory law […] The main (but not the only) reason to employ legislation is that laypersons and legal officials alike remain uncertain and divided about the content of our moral duties, and an authoritative device is needed to allow the political process to function while these disputes are ongoing […] The state uses statutory law rather than morality to identify persons eligible for liability and punishment because direct recourse to the normatively relevant factor –morality itself- would be too divisive and uncertain".[185]

Nevertheless, relevant figures of both traditions have drifted from the orthodoxy of their established intellectual positions towards a more eclectic attitude. Amongst the *legal moralists* is the influential philosopher Duff who, although in earlier woks upheld a moral content-dependent approach for his concept of crimes as 'public wrongs' and intensely criticized potential conduct guidance of the criminal law,[186] has since revised his account

[181] Aside from the isolated analysis about criminal responsibility or causation developed by HLA Hart, or the more contemporary (and theoretically weak) attempt by Paul Robinson to devise a criminal code from a positivist/utilitarian perspective, criminal theory has been resistant to inspiration from legal positivism.
[182] See M. Moore *Placing Blame: A general Theory of criminal Law* (1997)
[183] See A. Duff's concept of public wrongdoing: A. Duff "Towards a Modest Legal Moralism" *Criminal law and Philosophy* (2013) 8(1):217-235 at p218
[184] See A. Duff (2002) "Rule-Violation and wrongdoing" in *Criminal law Theory: Doctrines of General Part* (2002) at p55
[185] D. Husak *Ignorance of law: A philosophical inquiry* (2016) at p259
[186] Ibd. at p54

to a more process–orientated and quasi-positivist account.[187] This conversion is the result of the insuperable difficulty that *legal moralists* have encountered historically to allocate regulatory offences, also known as *mala prohibita*, in any morally based criminalization theory. Such a theory of criminalization becomes less moralistic and more process-orientated. At the other end of the spectrum, *legal positivists,* like Shapiro with his recent planning theory, [188] have recently embraced a more sociological conception of positivism. If norms are social plans, Shapiro says, it is obvious that the legal phenomenon necessarily has something to do with a given social and political context. This sociological methodology is not new in the legal positivist tradition. Hart himself proclaimed in *The Concept of Law* that his work "may also be regarded as an essay in descriptive sociology" (never expanded).[189] Nonetheless, some relevant legal positivist authors have refused and contested utilising a sociological approach to legal theory.[190]

What appears to be indisputable is that both traditions have driven legal theory towards what Lacey appropriately labels "philosophical imperialism". [191] From the *legal moralist* tradition, law is a subspecies of moral theory. For legal positivists it is an exclusive system able to autonomously organize its propositions about legality. A system exclusively focused, as Kornhauser [192] suggests, on the *legal order* and its prohibitions and permissions, disregards its legal institutions, political pluralism and the structures of global governance. However, that also ignores the new social functions of the law, not just as a negative coercive guardian of the patterns of conduct, but as an active political and positive player in the deployment of social policies. This new interventionist regulative model is

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[187] See F. Meyer "Towards a Modest Legal Moralism: Concept, Open Questions and Potential Extension" *Criminal law and Philosophy* (2012) 8(1):237- 244. See also L. Farmer "Criminal wrong in historical perspective" *The Boundaries of Criminal Law* (2010) at p223

[188] See S. Shapiro *Legality* (2011)

[189] See N. Lacey "Analytical Jurisprudence versus Descriptive Sociology Revised" *Texas Law Review* 84(4):945-982 at 981 where Lacey identifies in Raz's discussion of identity in legal systems this attitude of Hart and others to add socio-legal aspects to a positivist outlook. He does this when he makes a distinction between momentary and non-momentary legal systems, stating that in the latter; identity is fixed by its (moral) content, rather than through any formal criteria of legal validity understood as legal standards.

[190] Kelsen in his pure theory of law rejects any relation between law and morality but also with others social sciences. See also J Raz, "The authority of law: essays on law and morality, the institutional nature of law" at pg105 where he argues that a legal theory must be true of all legal systems. Such a theory has to identify general and abstract features and disregard those functions that some legal systems fulfill in some societies because of the special social, economic, or cultural conditions of those societies. Legal theory must fasten only to those features of legal systems that they must possess regardless of the special circumstances of the societies in which they are in force. For Raz, philosophy is concerned with the necessary and the universal whereas sociology is concerned with the contingent and the particular.

[191] See N. Lacey "Analytical Jurisprudence versus Descriptive Sociology Revised" *Texas Law Review* 84(4)945:982 at p948

[192] See L. Kornhauser "Governance Structures, Legal Systems and the Concept of Law" *Chicago- Kent Law Review* (2004) 79:355 at p375

substantively characterized by economical, political, technical and axiological criterion, not by moral wrongs.

A more extensive scrutiny of both schools is far beyond the aim of this research. This research endeavours to find a principled and coherent solution for false beliefs; for this reason this study will be focused on the significance of the concept of knowledge of the law for both schools of thought. The Platonic account of knowledge[193] as *justified true belief* has been accepted by philosophers and scholars for centuries.[194] Therefore, a rational way to analyse the legal relevance of false normative beliefs is by scrutinising the approach that different scholars and legal traditions have taken towards the concept of legal knowledge. The reason for this operational formula is that false normative beliefs and knowledge of the law are mutually exclusive concepts. Thus, it can hardly be expected that a fresh approach to false (normative) beliefs could be achieved without a thoughtful scrutiny of the significance of knowledge of the law.

2.3 Knowledge of the law in the legal moralist tradition

In the *legal moralist* tradition the "law requires man at their peril to know the teachings of common experience, just as it requires to know the law".[195] This position would probably be defensible if, as legal moralists believe, law has a moral base. Under this argument, it can be presumed that everybody should know the moral principles inherent to their society. Let me begin by considering the historical reasons behind this irrelevance of legal knowledge in the attribution of criminal responsibility. The concept and nature of crime provided by those early *legal moralists* who emphasized the role of Divine grace and benevolence in the explanation of crime could be seen as a precedent for this approach. Take, for example, the New England Puritans who preached in their sermons the Divine origin of morality and the share of it that every person has. This position, in relation with crimes, can be condensed in John Bradford's proverbial saying when seeing criminals being led to execution: *"There but for the grace of God go I"*. For the New England Puritans, crime is a product of the fallen nature that all human being share.[196] They explained crime in terms of a loss of God's free grace previously given.

[193] G. Fine "*Introduction*" in *Plato on Knowledge and forms: selected essays* (2003) p5
[194] A major challenge of the standard view comes from Gettier. See E. Gettier "Is Justified True Belief Knowledge?" *Analysis* (1963) 23(6):121-123
[195] O. Holmes *The Common Law* (1881) at p57
[196] See K. Halttunen *Murder Most foul: The Killer and the American Gothic Imagination* (1998) at pp8-32

Criminal execution of (public) punishment is justified as the "*theatre of mercy"*[197] where the members of the community share the moral failure of the convicted as inheritors of the original sin.[198] It is reasonable to assume that for the New England Puritans, knowledge of the law was irrelevant and any purported injustice caused by a wrong or incorrect application of the *ignorantia iuris* would be a replication of the shared human imperfection and loss of grace.

In the same tradition, the American Lawyer and scholar Bishop also emphasizes Divine benevolence and explicit Christian explications of the law of crimes. For Bishop the "law was written in our hearts".[199] It seems difficult to find a better argument to uphold the irrefutability of the presumption of universal knowledge of the law and its counterpart duty to know it. Bishop identifies law as "[…] the offspring of God; and, like him, [it] is everywhere".[200] He understands Law as "[…] God' s abstract right"[201] and the courts of justice as closely directed by God. Bishop was, however, embedded in 19th century Victorian moralism and, for that reason, he provides in his Commentaries on the Criminal Law[202] an account of criminal liability based more on individualistic responsibility than did John Bradford. He emphasises individual responsibility identifying crime with the particular "wrongful intent" and the "criminal mind of the offender".[203] Bishop was probably influenced, in his position of individual responsibility as axiomatic, by Blackstone who, a century earlier, reflected on the significance of criminal will or intent as an affirmative essential element of crime.[204] With this argument, Bishop proposed a comprehensible solution for *ignorantia iuris* and knowledge of the law*:* "[…] most indictable wrongs are mala in se, and if so offenders do not know that the law of the land forbids their acts, they are conscious of violating the law written in their hearts. And they have little cause to complain when unexpectedly called to receive, in this world, some of the merited punishment they had hoped to postpone to the next". [205] Where for the New England Puritans crime was the product of a common shared fate, Bishop, rooted in a

[197] Ibd at 23
[198] See G. Leonard "Culture and Doctrine from Blackstone to the Model Penal Code" *Buffalo criminal Law Review* (2002-2003) 6:692 at p737
[199] See J.P. Bishop *Commentaries on the Criminal Law* (1858) at p1
[200] Ibd at p1
[201] Ibd at p2
[202] Ibd
[203] Ibd at p259-60
[204] "All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will". J.P. Bishop Ibd at pp207-212
[205] Ibd at p239

Victorian moralism era that vindicated the existence of individual moral choice, proposed that crime was the result of the private and individual choice to act immorally.[206]

More in line with the secular perspective demanded by the age of Enlightenment was the work of Blackstone.[207] Blackstone set out to change English law from a system based on actions, with people uncertain as to what the law was, to a system of substantive law. He proclaimed that criminal law in England needed reform, revision and amendment. He argued for criminal law as a principled branch of law "[…] founded upon principles that are permanent, uniform, and universal; and always comfortable with the dictates of truth and justice […] thought sometimes may be modified, narrowed or enlarged, according to the local or occasional necessities of the state which it is meant to govern".[208] Blackstone, for example, pointed out that there was no room in eighteenth century criminal law for capital crimes like "[…] to break down (however maliciously) the mound of a fishpond, whereby any fish shall scape". He was conscious that these outrageous penalties were occasionally inflicted and "[…] hardly known by the public: but that rather aggravates the mischief, by laying a snare for the unwary".[209]

His acknowledgement, three centuries ago, that the expansion of *mala prohibita* offences, unknown by the public, were a "*snare for the unwary"* is remarkable. However, instead of aligning his ideas with the more libertarian principle of prospectivity proposed by the codification movement, identifying the guidance function of law, Blackstone also advocated a purported duty or presumption of universal knowledge of the law: "every person of discretion […] is bound and presumed to know the law".[210] Behind this intellectual spin resided his concept of criminal law as a matter of public policy and interest[211]. Accordingly, when a person misunderstands or ignores the law and commits an unintentional harm that confronts the public, i.e "public wrong", that person is a legitimate object for criminal punishment. Punishment is justified as far as its rationality sustains the

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[206] M. Benedict "Victorian Moralism and Civil Liberty in the Nineteenth Century United States" in *Constitution, law and American Life, Critics aspect of the ninetheenth-century Experience* (2011) at p108

[207] Blackstone affirms that a norm that does not conform with natural law cannot be legally valid: *"*this law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original*"*. W. Blackstone *Commentaries on the law of England* (1769) book 4 at p47

[208] W. Blackstone *Commentaries on the law of England* (1769) book 4 at p3

[209] Ibd at p4

[210] Ibd at p24

[211] Blackstone asserts *"the function of the criminal law was to secure to the public the benefit of society, by preventing every breach and violation of those laws"*. Ibd at p5

integrity and the security of the public. This position looks apparently inconsistent with his acknowledgement of the abundance of '*snare for the unwary*' offences, but it emphasizes the relevance and pre-eminence of a concept of crime as public wrong: "Wrongs, or crime and misdemeanors, are breaches and violations of the public rights and duties, due to the whole community, […]".[212] Around this duty to know the law, Blackstone proposed the consequentialist solution that "Ignorantia iuris in criminal cases is no sort of defence".[213] He initiated the tradition of considering *ignorantia iuris* as another potential plea which, if successful, could protect the committer of a forbidden act from punishment if he does not display a vicious will:[214] "All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will".

Contemporary scholars like Duff and Horder have also defended this *legal moralist* perspective towards knowledge of the criminal law. They challenge the ability of any guidance to produce results based on predictions of the law because they are too simplistic and disregard the moral complexity of the criminal law. The premise of the argument for these legal moralists rests on the difference between *mala in se* and *mala prohibita* crime. In *mala in se* crimes, the line of reasoning holds that few would be motivated to refrain from crime only in order to respect the authority of the law. Legal norms understood as content-independent reasons for action cannot be motivationally effective against those who are not motivated to refrain from crime due to the pre-legal wrongfulness of such conduct.[215] What justifies the law prohibiting *mala in se* crimes, Duff says, is not its motivation/guidance but the fact that such crimes constitute "public wrongs". [216] Declaring their public wrongfulness, the law puts forward content-dependent reasons for action that represent the values of the community. It is by the *ex post facto* censure in public trials of those who have committed such wrongs that criminal law finds its justification. To deal with the vagueness of the concept of 'public wrong', criminal philosophers incorporate the theoretical concept of "determinatio"[217] developed by Finnis. In both, *mala in* se and *mala prohibita* crimes the law provides concrete "determinations": legal specifications to the required legal degree of exactness that the pre-legal public wrongfulness is unable to

[212] Ibd at p5
[213] Ibd at p26
[214] Ibd at p28
[215] A. Duff "Rule Violations and Wrongdoing" in *Criminal Law: Doctrines of the General Part* (2002) at p55
[216] A. Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) at p128
[217] J. Finnis *On Natural Law and Natural Rights* (1980) at pp285–286

specify. In controversial issues like euthanasia,[218] these criminal legal moralists use this concept of "determinatio" to legitimate that legal authority can mark-off the conduct as wrongful. In such cases where some citizens defend the wrongfulness of conduct while others believe it to be permissible, legal authority can resolve the controversy by "determination". Duff says that "In such cases, what the law says to those who dissent from the stand it takes is not simply and unqualifiedly that the conduct in question is wrong, but rather that this is now the community's authoritative view: even if they dissent from its content, they have an obligation as members of the community to accept its authority—to obey the law, even if they are not persuaded by its content, unless and until they can secure a change in it through the normal political process". [219] As a result, they affirm that the criminal law should address citizens in terms of substantive pre-legal values using a 'moral language' that identifies crimes as public wrongs not by the prohibitions, permissions and commands usually inherent in the language of legal norms. As mentioned above, Duff's views seem to be changing towards a more procedural positivistic attitude.[220]

Moreover, Horder accuses the supporters of the purported legal positivist "guiding view" of having maliciously reconstructed, for their own intellectual benefit, the concept of "determinatio"[221]. Legal positivists elevate the *mala prohibita* model of prohibition as being the dominant example of criminal law. This approach, according to Horder, misrepresents the close connection that crimes (or at least *mala in se*) have with (public) wrongfulness. In this way, he argues, legal positivists attempt to defend the idea that lawmakers creating law have discretion, free from moral constraints, to shape prohibitions in an instrumental way. Such an argument attempts to replace moral with legal guidance. This kind of tactic is misleading, according to Honoré who asserts that "where morality is insufficiently determinate the law must step in ex catedra, by creating mala prohibitum*".*[222] But he points out that this use of "determinatio" by lawmakers should be exceptional. For example, there is a moral reason to drive safely and respect traffic regulations. However, there is no moral obligation to drive below 30 miles per hour. The accurate specification of the limit, whether it be 30 or 50 miles per hour, is not a moral issue and can be discretionally fixed by the law *ex catedra*.

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[218] A. Duff "Rule Violations and Wrongdoing" in *Criminal Law: Doctrines of the General Part* (2002) at p55
[219] Ibd at p55
[220] Ibd at p4
[221] See J. Horder "Rethinking Non-Fatal Offences Against the Person" *Oxford Journal of Legal Studies* (1994) 14(3):335
[222] T. Honore "The Dependence of Morality in Law" *Oxford Journal of Legal Studies* (1993) 13:1

Indeed, within this difficulty to accommodate *mala prohibita* in modern criminal law resides one of the main flaws of legal moralist thinkers about the crucial significance of knowledge of the law. Despite the change initiated by the Criminal Law Consolidation Acts 1861[223] in England and what was known as the "inspection fever"[224] in the mid-nineteenth century, the bulk of English criminal law is to be found, due the absence of a criminal code, in dispersed statutes or in often inaccessible case law. Although different statutes have created new offences, or amended or repealed existing ones, the number of true criminal offences remain reasonable controlled. On the other hand, the use of criminal law by legislators to help achieve regulatory ends has increased the number of criminal offences to levels that have stunned scholars, politicians and even the public alike. This expansion of the criminal law has been exponential in the last few decades. In 2006, the political editor of the *Independent* newspaper, Nigel Morris, published an article claiming that during Tony Blair's New Labour government, 3023 new offences had been created since May 1997: 1169 by primary legislation and 1854 by secondary legislation.[225] Prior to the publication of this article, JUSTICE carried out a survey in 1980 that acknowledged the existence of at least 7208 criminal offences in the statute book.[226] In 2008, Chalmers and Leverick suggested that more than 10,000 offences existed in English law.[227] Andrew Ashworth warned that there could be around 8000 criminal offences in the statute book and at common law. [228] In any case, Chalmers and Leverick have empirically demonstrated recently that the rate of creation of criminal offences could be even faster than previously assumed.[229]

This over-proliferation of criminal offences is in large part due to the regulatory framework.[230] In this context, primary legislation often provides that criminal offences can

[223] These are Acts of the UK Parliament that consolidate provisions and common law with the aim to simplify the criminal law for serious wrongdoings.

[224] Victorian governments during the mid-nineteenth century enacted a considerable amount of regulatory criminal offences without connection to the serious moral wrongdoing traditionally demanded in such criminal offences.

[225] N. Morris "Blair's 'Frenzied Law Making': A New Offence for Every Day Spent in Office" *The Independent* (London, 16 August 2006)

[226] Justice (n 11), examining C.T. Latham and J. Richman (eds) *Stone's Justices' Manual* (1975)

[227] J. Chalmers and F. Leverick "Fair Labelling in Criminal Law" *MLR* (2008) 71:217

[228] A. Ashworth "Is the Criminal Law a Lost Cause?" in *Positive Obligations in Criminal Law* (2013) p1

[229] J. Chalmers and F. Leverick "Tracking the Creation of Criminal Offences" *Crim. L.R.* (2013) 7:543-560; See also J. Chalmers "Frenzied Law-Making: Overcriminalization by Numbers" *Current Legal Problems* (2014) 67:438

[230] For a detailed study about the creation of criminal offences see J. Chalmers and F. Leverick "Tracking the Creation of Criminal Offences" *Crim. L.R.* (2013) 7:543-560

be created by secondary legislation (regulations or orders).[231] Secondary legislation is by far easier to enact than statutes are. In fact, once laid before parliament secondary legislation normally becomes law if no one objects to it within a specific period of time. The result is that around 3000 pieces of secondary legislation are created annually (obviously not all of them create criminal offences). This legislative mechanism also entitles government agencies created by statute (primary legislation) to pass criminal offences needed to enforce the standards of behaviour appropriated to that particular agency. As a result, criminal offences can be created directly by government ministers (using both primary or secondary legislation) or by government regulatory agencies created by statute using secondary legislation.

Facing this scenario, it is also relevant to point out that there are now more than 60 national regulators to which the government has granted powers to create and regulate standards of behaviour.[232] These agencies share their law-making powers with the 486 current local authorities in the United Kingdom and other trading standard authorities with powers granted to create criminal offences.[233] Thus, not only it is impossible to know exactly how many offences we have in the statute book, it is also equally arduous to ascertain how many legislative bodies have been granted powers to create criminal offences.

In order to confront this situation, in early 2009 it was agreed between the Ministry of Justice and the Law Commission to undertake a project with the broad aim of introducing rationality and principle into the structure of the criminal law. In particular, this involved the provision of non-statutory guidance by the Law Commission to all governments departments involved in creating criminal offences.[234] Following the recommendation of the Law Commission, the 2010 Coalition's Programme for Government introduced a 'gateway clearance' mechanism to prevent the proliferation of unnecessary new criminal offences, and repeal, amend and re-enact any existing ones.[235]The new Criminal Offences Getaway was established within the Ministry of Justice.[236] Additionally, the Ministry of Justice is also to publish annual statistics counting

[231] A. Lilly, H. White and J. Haigh *Parliamentary Monitor 2018* Institute for Government (2018) at p45
[232] Law Commission Consultation Paper N 195 (fn.18), para 1.21.
[233] Ibd.
[234] The Law Commission Consultation Paper N 195
[235] HM Government, *The Coalition: Our Programme for Government* (HM Government 2010) 11.
[236] Its aim was to scrutinize proposals to create or amend offences across Whitehall, in line with the commitment of the government to prevent the proliferation of unnecessary offenses, so new behaviour is not criminalized lightly. The Secretary of state for Justice must approve proposals to create or extend

new criminal offences created by governments in England and Wales,[237] But in 2015 the government agreed to discontinue the criminal offences gateway. After that, the Ministry of Justice, through the Home Affairs Committee clearance process, now scrutinises the creation of new offences. Those departments proposing new offences have to complete a Justice Impact test[238] and clearance will not by given for unnecessary or disproportionate offences.[239] The practical consequences of the state of affairs described above are, as Chalmers argues,[240] that even for experienced lawyers and even prosecutors it is sometimes difficult to know or ascertain the law. In *R v Chambers,*[241] changes in the law in relation to the confiscation of the proceeds of crime that were more favourable to the defendant were unknown by both the prosecutor and defence lawyers, despite the fact that the change in the law occurred five years prior. Although the Court of Appeal recognized and criticized the unsatisfactory confusing situation of the criminal law that was not often practically accessible,[242] it explicitly confirmed the totemic slogan "ignorance of law is no excuse".

Most of the approximate 10,000 valid offences in the UK are regulatory,[243] content-independent or *mala prohibita.* There are no statistics about the number of these offences that could be categorized as *mala prohibita* (in the sense that they do not obviously tie in with common understandings of morality). Furthermore, some of them prohibit conduct that most people would have no problem regarding as morally wrong, e.g. discharging poisonous waste into rivers, or prohibiting the use of toxic ingredients in food. However, we can certainly assume that knowledge of the legal norms that regulate this conduct are key. Our modern multicultural, globalised and sophisticated society shares a mixture of

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new criminal offences only where he is satisficed that the proposed offences are necessary, although no test of necessity has been established.

[237] Date reveals a reduction in the number of offences created in the periods 2010 to 2013 after the creation of the Gateway mechanism (see: https://www.gov.uk/government/publications/new-criminal-offences-statistics-in-england-and-wales--2) specially compared with Scotland where the Gateway instrument does not apply (See: J. Chalmers and F. Leverick "Scotland: Twice as much Criminal Law as England?" *Edinburgh Law Review* (2013) 17(3):376-381. Statistics also show that 712 offences have been created in 2010, 174 in 2011 and 292 in 2012. Source: Ministry of Justice *New Criminal Offences: Englad and Wales* (2009-2012)

[238] Ministry of Justice *Justice Impact Test* (2016)

[239] Ministry of Justice *Advice on Introducing or Amending Criminal Offences and Estimating and Agreeing Implications for the Criminal Justice System* (2015)

[240] J. Chalmers "Frenzied Law-Making: Overcriminalization by Numbers" *Current Legal Problems* (2014) 67:438

[241] (2008) EWCA Crim 2467

[242] At para 64

[243] We do not have statistic about the number of regulatory offences that could be categorized as *mala prohibita* (in the sense that they do not obviously tie in with common understandings of morality) and some of them prohibit conduct that most people would have no problem in regarding as morally wrong e.g. discharging poisonous waste into rivers, not using toxic ingredients in food.

morality, social practices and standards of behaviours. Different citizens have different approaches to the same issues or practices where wrongdoing has just an ancillary role, if any. Animal cruelty is a good and current example. Starting with the London Police Act 1839[244] and now with the Animal Welfare Act 2006,[245] animal abuse or animal cruelty has been proscribed and prohibited. Animal cruelty can take different forms, but should exercising culinary practices like plunging live lobsters into boiling water, as Swiss law recently banned,[246] be a criminal offence? Or should lobsters be stunned before being put to death? Or should it be prohibited to store lobsters on ice in a restaurant kitchen, as French law recently decided,[247] because it causes them unjustified suffering before they are cooked? Or none of them? Different members and groups of the society will have different views about the way that our social life should be organized and about the expectations we have relating to the behaviour of other citizens. It is imperative then to mark the point where private values or standards become a compulsory and required standard for all members of the society. Only by sharing normative expectations can we trust others (included chefs) because we can forecast their future behaviour and adjust our actions accordingly. Legality provides both an ascertainable way of guiding and creating expected behaviour, while also protecting these expectations. In this picture, a purported irrelevance of knowledge of the current law is a preposterous presumption.

Another ontological argument is at stake here. For those who support a legal moralist stance, "culpable wrongdoing provides a desert-based reason for punishing a responsible agent".[248] The accused must have engaged in a moral wrong if an adequate justification for punishment is to be provided. He must have committed moral wrongdoing to be convicted. Or, as Husak reflects, "[..] if morality does all the inculpatory and exculpatory work as regards blameworthiness, what role is left for law? […] why do care about the law at all?"[249] Criminal laws are no more than a surrogate for morality.[250] Legality does not have any role in in the attribution of responsibility. Therefore, the acute normative argument of exculpation is "ignorance of the morality underlying law, and not ignorance of law itself".[251] Legality and knowledge of the law or false beliefs about it should be entirely irrelevant.

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[244] Metropolitan Police act 1839
[245] Animal Welfare Act 2006
[246] E. Saner *Switzerland rules lobsters must be stunned before boiling* (2018)
[247] Reuters News *Agency Italian Court Rules Lobsters must no Catch Cold Before Cooking* (2017)
[248] D. Husak "What's Legal about Legal Moralism" *San Diego L. Rev*. (2017) 54:381
[249] D. Husak *Ignorance of law: A philosophical inquiry* (2016) at p259
[250] Ibd at p259
[251] Ibd at p262

2.4 The prominence of knowledge of the law in the legal positivist tradition

From the perspective defended by *legal positivists*, knowledge of the law and its relevance in practical reasoning before acting is salient. The 'guidance view', as it is named in this paper, denotes the ability of the law to rise above merit-based, moral discussions and guide citizens *ex ante*; the ability to guide indeed becomes impossible if we get stuck debating conflicting moral considerations for guidance.[252] At the other end of the spectrum is the libertarian prospective approach towards the law that is at the heart of the codification movement. Although like them, *legal positivists* nevertheless contend that criminal law, above all, must be genuinely accessible to citizens as a tool for governing their conduct. This right to know the law goes beyond a "fair notice" principle to provide prospective wrongdoers a fair opportunity to avoid the hardships inherent in punishment. To know the law is a right of the citizens because otherwise they cannot take it into consideration in their deliberation process before action: the law is not written in our hearts. For that reason, any legal system has to have cognoscible rules of action which can guide conduct.[253] This position should not be taken to imply support for the existence of only codified or statutory law, in the way that earlier positivists like Bentham have firmly and fiercely denounced judge-made law as 'dog-law':[254]" […] It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do - they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it". According to the positivist account, criminal responsibility, and consequently punishment, should be restricted only to those cases where the citizen has adequately taken notice that her liberty has been authoritatively circumscribed. Only knowing violations of the law should be prosecuted, consistent with modern principles of liberty and autonomy. Thus, the statement made by the codifier E. Livingstone "[…] to be free a people must know the law by which they were governed"[255] is still effective.

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[252] See J. Raz *The authority of law* (1979) at pp50-51

[253] JP. Shofield and J. Harris (eds) *The Collected Works of Jeremy Bentham. Legislator of the World: Writings on Codification, Law and Education* (1998) at p19

[254] J. Bentham *Truth* versus *Ashhurst; or, Law as it is, Contrasted with What it is Said to Be* (1792) at 235

[255] E. Livingstone *The complete Works of Edward Livingstone on Criminal Jurisprudence* (1873) at p119

The forward-looking guidance not only of officials, as defended by Kelsen,[256] but of ordinary people was intensely endorsed by HLA Hart. Hart highlighted his prominent function of the law in clarifying how to act to its followers: "law […] should be concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is"[257] He underlined that the guidance view was essential in order to understand criminal law as a mean of social control. Rejecting Austin's imperative concept of law, Hart claimed that laws are legitimate standards of conduct that good citizens could comply with, irrespective of the punishment associated with default. He held that […] it is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happened in courts" […]"as a mean of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failure of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court".[258] He also explained that the purpose of criminal law "…is to designate by rules certain types of behaviour as standard for the guidance of the members of society … they are expected without the aid or intervention of officials to understand the rules and to see that the rules apply to them and conform to them […] in this sense they apply the rules themselves to themselves".[259] After all, what Hart vindicates is that rules should be put in practice by the citizens and not merely suffered by them.

Joseph Raz defended a similar position in his recognized theory of rules as "exclusionary reasons". Raz argues that we are guided by a rule when we take the rule as a reason that excludes other reasons for action. "Conflicts of reasons are resolved by the relative weight or strength of the conflicting reasons which determines which of them overrides the other".[260] But not all conflict of reasons are of the same kind. Raz differentiates between first and second order reasons. First order reasons favour or refrain us from performing a certain action. Second order reasons refrain us from performing the action favoured by first order reasons. Exclusionary reasons are second order reasons to refrain from acting on the balance of reasons if the reasons favouring the balance are

[256] Although the "guidance principle" is usually attributed to legal positivists, for one of its most fervent architects, Hans Kelsen, *"law is the primary norm which stipulates the sanction"* See H. Kelsen *General Theory of Law and State* (1999) at p63
[257] H.L.A. Hart *The Concept of Law* (1994) at p39
[258] Ibd at p39
[259] Ibd at p38
[260] J. Raz *Practical Reasons and Norms* (1975) at p35

excluded by an exclusionary reason.[261] Even though a balance of reasons might incline us to opt for a particular preferred action, as rule-followers we ignore that favoured action and favour the action endorsed by the rule. Exclusionary reasons are reasons for "not being motivated in one's actions by certain (valid) considerations. They are not reasons for not conforming with the reasons. They exclude reasons from being one's motivation for action […]".[262] As a result we can only be held responsible for behaviours guided by our capacities as rational agents and performed and guided for what we believe to be an adequate reason. We cannot be guided for a reason we are unaware of. Therefore, knowledge of the law (and false beliefs about it) are crucial in the attribution of criminal responsibility.

Raz's disciple, John Gardner, appealing to the rule of law principle and the relevance of the rules in our practical reasoning, also supports the "guidance view" when he says that "[…] according to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans."[263] He transfers specifically the 'guidance principle' to criminal law by asserting:"[…] those of us about to commit a criminal wrong should be put on stark notice that that is what we are about to do". [264] Finally, it should be highlighted that even moral scholars like Dworkin have recognized the relevance of the guidance view in the adjudication process. He considers criminal law as an exception to his general thesis that responsibility derives not only from statute or explicit set out case law decisions, but also from the principles of personal and political morality.[265] Dworkin recognizes that criminal law is very close to unilateralism,[266] and "[…] no one should be found guilty of a crime unless the statute or other piece of legislation establishing that crime is so clear that he must have known his act was criminal, or would have known if he

[261] Ibd at p39
[262] Ibd at p185
[263] J. Gardner "Introduction" in H.L.A. Hart *Punishment and Responsibility* (2008) at xxxvi; and see also the use of Hart's arguments by A.T.H. Smith, n 17 above, 23.
[264] J. Gardner "Wrongs and Faults" in A.P. Simester (ed) *Appraising Strict Liability* (2005) pp69-70
[265] R. Dworkin *Law's Empire.* Cambridge (1986) at p96
[266] Unilateralism implies that an obligation must be clear from the moment of legislative enactment. See J. Raz, "Intention in interpretation" in *The Autonomy of law*: Essays on Legal Positivism (2012) at p252

had made any serious attempt to discover whether it was.[267] His words clearly emphasise the relevance of knowledge of law in the attribution of responsibility.

2.5 The guidance view and practical reasoning

The acceptance of the guidance view means that law (and consequently its knowledge) plays an essential role in the practical reasoning of the agent in the moment of action: that is, it entails recognising law as a consideration that has different effects on our thoughts and behaviour, whether as a subjective source of motivation or not.[268] The norm that defines and punishes theft is perhaps not a source of motivation for conformity with the law by itself. As Raz says, "I will feel insulted if it were suggested that I refrain from murder and rape because I recognize a moral obligation to obey the law".[269] We are not guided by a legal rule every time we act. The agent is guided also by their personal values, moral principles or fears, although they obviously know (or should know) the legal rules that prohibit stealing. The rules of theft only guide my actions when it makes a difference in my practical reasoning *qua* legal norms, not *qua* moral principles or values. Does this mean that the purpose of the criminal law pointed above by Hart as "... to designate by rules certain types of behaviour as standard for the guidance of the members of society" is wrong? Are legal moralists correct when they assert that the actual motivation is only provided by the pre-legal wrongfulness of the conduct? Should the criminal law be addressed then to Holmes' bad man instead of the ordinary citizen, or the puzzled or ignorant man "who is willing to do what is required, if only he can be told what it is?".[270]Beyond the above uncertainties, as it will be illustrated below when explaining the position held by one of the leading positivist scholars, laws guide us because they are the only source of legitimate information about legality.

According with legal positivist thinkers, as rational beings we engage in a balance of reasons before acting and law is a relevant factor to our practical reasoning. Another issue is the way in which different legal philosophers argue about how the outputs of the citizen's practical reasoning are affected by law. For classical positivists like Austin or Bentham our practical reasoning is affected mainly by the external coercion attached to non-conformity with the rule. Later positivists like Hart affirm that an agent is guided by a

[267] R. Dworkin *Law's Empire* (1986) at p96
[268] See below externalism *versus* internalism debate.
[269] J. Raz *Ethics in the Public Domain: Essay in the Morality of Law and Politics* (1994) at p343
[270] H.L.A. Hart *The Concept of Law* (1994) at p40

social rule if he acts with a critical manner.[271] They consider the rule as a social standard of conduct- as social practices. Divergence from this social standard will be subject to social criticism. Raz, from a different perspective, and in his recognized theory of rules as "exclusionary reasons" mentioned above, argues that we are guided by a rule when we take the rule as a reason that excludes other reasons for action.

The field is broadly controversial. The capacity of practical reason to give rise to intentional action divides even those who agree that norms are reasons for action: for internalists like Williams[272] reasons for action must be grounded in an agent's prior motivation, "our subjective motivational set"; externalists like Parfit[273] reject this picture, contending that one can have reasons for action that are independent of one's subjective motivational set. Therefore, normative reflections are taken independently of our motivational set and capable of opening up new motivational possibilities. Finally, scholars like Korsgaard[274] hold that a rational person who judges compelling reasons to act for a particular reason normally forms the intention to act in that particular way. His judgment is sufficient explanation, without the need to appeal to additional forms of motivation beyond the original judgment and the reasons it recognises.

A profound study about how the outputs of the addressee's practical reasoning are affected by rules belongs to the field of psychology and exceeds the aim of this paper. Nevertheless, for present purposes we can accept the basic premise that we all learn from the law our legal obligations, rights and our duty to conform to the law. Legal rules are the source of legitimate information about legality, and in this way they guide us. We learn some of our expected patterns of behaviour from our parents, teachers and so on, but this does not prevent legal rules from being the source of information about our expected legal standard. In our modern and sophisticated societies legal norms inform citizens about their legally expected conduct. But legal authorities demand from us conformity with the legal standard irrespective of whether our motives to accomplish are based on morality, personal values, tradition or fear of punishment. The reason for this is that lawmakers are only interested in the external conduct, not in the citizen's motivation.

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[271] Ibd at pp54-6, 86-8. See also J. Raz, *Practical Reasons and Norms* (1975) 49-58
[272] B. Williams "Internal and External Reasons" in Ross H, (ed) *Rational Action* (1979)
[273] D. Parfit "Reasons and Motivation" *The Aristotelican Society* 77:99-130
[274] C. Korsgaard "Skepticism about Practical Reasons" *Journal Of Philosophy* (1986) 83:5-25

Shapiro's analysis and discussion of Hart's "internal point of view",[275] distinguishing between epistemic and motivational guidance, could be illuminating here. A rule, says Shapiro, regulates one's conduct and gives us a reason for action in at least two ways: "The rule can motivate action simply by virtue of the fact that the rule regulates the action in question. Or it can inform the person of the existence of certain demands made by those in authority, and as a result, that conformity is advisable".[276] In the first alternative he names 'motivational guidance', the rule-addressee is motivated to follow the rule *because* of the rule: he believes that the rule is a legitimate standard of conduct. The addressee acts on this belief and, for that reason, the rule is his unique source of motivation for conformity. 'Epistemic guidance', on the other hand, implies that the addressee may not conform to the rule because of the rule. Epistemic guided addressees may only conform to the rule because they want to avoid punishment, social stigma or other personal reasons. However, even for them the legal norm is a source of information regarding what counts as conformity. A person is epistemologically guided by a legal rule when he learns from it his legal duties and conforms to them. As Shapiro points out, this concept of epistemic guidance was what Hart had in mind when he declared, "the principal functions of the law as a means of social control are… to be seen in the diverse ways in which the law is used to control to guide and to plan life out of court".[277] Legal rules are the source of legitimate information about legality. When we want to know if the law regulates specific conduct we have to look at legal rules to ascertain if the conduct is regulated and the way the legal rule regulates it. The ordinary citizen, the puzzled or ignorant man and Holmes' bad man are all "epistemically" guided by legal rules. We all learn from these legal rules both our legal obligations and our duty to conform to the rule because of that knowledge without engaging in further normative deliberation.

As mentioned above, modern multicultural societies share a blend of moral values, principles and standards of behaviour. Different members and groups of the society will have different views about the way that social life should be organized. Different members have distinct approaches concerning the content of our social duties and responsibilities, but also about the expectations we have relating to the behaviour of other members of the society. It is crucial then to distinguish between those private values and standards of behavior held by different members and groups of society in a personal capacity, versus those values and standards of behavior which are compulsory and a required standard for

[275] S. Shapiro "On Hart's Way Out" *Legal Theory* (1998) 4(4):469-507
[276] Ibd at p490
[277] H.L.A. Hart *The Concept of Law* (1994) at p40

all members of the society, despite any conflicts these values may have with those of private groups. Legal rules provide ascertainable ways of guiding behaviour and publicly self-applying standards of conduct because they have been declared valid by the legal authority. This declaration of validity implies that the legal rule has been marked as an authoritative ruling. By doing so the law determines which standard of behaviour fits better to its primary function of assuring social co-operation. As Raz emphasises, law "…does so and can only do so by providing publicly ascertainable ways of guiding behaviour and regulating aspects of social life. Law is a public measure by which one measure one's own as well as other people's behaviour. It helps to secure social co-operation not only through its sanctions providing motivation for conformity but also through designating in an accessible way the patterns of behaviour required for such co-operation".[278] This 'behaviour designation' made by legal institutions binds members of the society – not because the chosen standard is justifiable on moral or private views – but because legal institutions select them as a legally obligatory pattern. Only in this way can law guide members of the society *ex ante*.

This approach raises the question of why someone should pay more attention to the marking-off rule rather than his moral reasons; why is a citizen apparently better conforming to the reasons that apply to him if he follows the guidance supplied by the legal authority than if he does not; why should citizens conform to 'law's exclusionary reasons' instead of acting on the balance of their first-order moral reasons? The answer to these questions takes the debate towards the topic of legal authority. Raz provides a partial answer in his 'service conception' of legal authority. Law performs the service of mediating between the ordinary citizen and the first-order reasons which apply to him. As a result, the ordinary citizen would conform better to the reasons that apply to him if he is guided by the authority's directives than if he is not.[279] Raz illustrates this premise with examples of regulations regarding dangerous activities*:* "I can best avoid endangering myself and others by conforming to the law regarding the dispensation and use of pharmaceutical products. I can rely on the experts whose advice it reflects to know what is dangerous in these matters better than I can judge for myself, a fact that is reinforced by my reliance on other people's conformity to the law, which enables me to act with safety in ways that otherwise I could not. Of course, none of this is necessarily so. The law may reflect the interests of pharmaceutical companies, and not those of consumers. If that is so

[278] See J. Raz *The Authority of Law: Essays on Law and Morality* (1979) at p51
[279] J. Raz "Authority and Justification" *in Philosophy and Public Affairs* (1985) 14(1):3-29

it may lack authority over me because it fails to meet the normal justification condition. But if it does meet the normal justification condition it is likely to meet the independence condition as well. Decisions about the safety of pharmaceutical products are not the sort of personal decisions regarding which I should decide for myself rather than follow authority. They do not require me to use any drugs, etc., and in that they are unlike decisions about undergoing a course of medication or treatment where we may well feel that I should decide for myself, rather than be dictated to by authority".[280]

2.6 The guidance view of individuals in social groups

The above argument justifies why the law addresses us in terms of legal rules in order to guide us to behave in certain ways without considering whether it is morally correct or not to do so. A valid rule emanating from a legal authority is a "content-independent' reason for action.[281] Its validity does not depend on the quality of its substantive content, or the moral value of what it asks us to perform. It gives the addressee a reason to comply irrespective of whether the citizen has reasons to act on its content. The fact that the rule requires that an act must be done or refrained from is both the right kind of reason and, at the same time, a reason to avoid the process of weighing the reasons for or against following the rule. But Raz's 'service conception', as well as the rest of the legal positivist thinkers, misses a crucial point about law proven in this research: its social dimension. We are rational but also social creatures and law seeks to guide and organize the behaviour of individuals in social groups.

By offering legal guidance the law makes it more likely that my actions will be coordinated with the rest of the society than a personal attempt to balance the content-dependent reasons by myself could. Consider my decision-making process when I am shopping across town when I am meant to be working and my boss calls me for an immediate meeting in his office. The likelihood that my boss fires me, my solid driving skills and my knowledge of the way back to the office may be compelling reasons to drive faster than 30 miles per hour or to skip a red light. On the other hand, the risks of injuring others or myself may be reasons to drive respecting the speed limit. Even the threat of a £100 fine, an *a priori* reason for conforming, could be easily overridden by my desire to keep my job. But to take the legal speed limit as another ordinary reason is not the best

[280] J Raz "The Problem of Authority: Revising the Service Conception" *Minnesota law review* (2006) 90:1003-1044 at 1014

[281] See H.L.A. Hart "Commands and Authoritative Reasons" in *Essays on Bentham* (1982) pp253–255

way to harmonize social cooperation and interaction. The rest of the members of the society *expect* me to follow the standard of conduct prescribed by the legal rule and they will behave according with this predictable expectation. The aim of the legal rules relating to driving generally is to guide and harmonize the behaviour of the whole group of drivers in order to achieve a safe and efficient driving environment.

This sociological dimension of law, which Joseph Raz's account misses, has been perhaps better acknowledged by Shapiro in his planning theory of law[282] where he affirms: "Legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others".[283] Moreover, the planning theory not only argues that legal activity is an activity of planning but social planning: "[…] legal activity creates and administrates norms that represent communal standards of behaviour".[284] Shapiro's planning theory, loyal to the roots of the analytic legal positivist tradition, attempts to show that in the realm of planning, norms can be discovered through social, not moral, observation.[285] He builds his theory assuming that rules in a legal system are plans because they structure legal activity and citizens can coordinate their activities and attain goods otherwise unachievable. In fact, his central argument is that rules themselves constitute plans or 'plan-like'[286] institutionalized plans.[287] And in one sense his resemblance approach is correct: we do not make plans if we do not use them to guide and evaluate our conduct. So 'plan-like' legal rules are entities that allow or permit or compel us to act in a certain way under certain circumstances.

Law guides us and organizes our behaviour in order to achieve ends that we would not be able to achieve otherwise. This is the aim or social goal of the substantive content of a legal rule. A genuine content for legal rules does not exist, its content are fixed in the context of the regulation in order to achieve a social aim. In criminal law (as in private law) the factual validity of a legal rule is also *symmetrical*: the potential perpetrator has to respect the legal rules and the potential victim should be confident enough that her

[282] Shapiro's Theory is based in Michael Bratman theories about planning and intentionality. *See, e.g.,* M.E. Bratman "Intention, Plans and Practical Reason" in *Center for the Study of Language and Information* (1987); M.E. Bratman "Shared Cooperative Activity" in *Faces of Intention* (1999); M.E. Bratman "Shared Intention" in *Faces of Intention* (1999)
[283] S. Shapiro *Legality* (2011) at p195
[284] Ibd at p203
[285] Ibd at p119
[286] Ibd at p120
[287] Ibd at p168

expectations are going to be respected and act accordingly. Legal norms are reasons for action but also *institutionalized social expectations*. It is Luhmann in his autopoietic theory of social systems that introduces this concept (undervalued by legal positivists) in the legal arena. Luhmann pointed out that law, as any other system does, processes normative expectations. The law cannot guarantee that the expectations will not be disappointed. But it can guarantee that they will be maintained as expectations, even in the case of disappointment. The norm communicates this in advance. Thus, for Luhmann normativity from a sociological point of view is counterfactual stability: the law protects our expectations.[288] From this sociological perspective a crime is the non-fulfilment of the social institutionalized expectations established in the legal norms that guide social conduct. Punishment is the social reaction against this non-fulfilment, disallowing the offender's behaviour and reinforcing the norm. If law provides the normative structure of the society, crime jeopardizes this normative structure. The punishment becomes an expression of the restitution of the validity of the law and it is justified *post factum* when the dissuasive aspiration content in the norm fails. This approach, it should be clear, is not suggesting that the normative restitution of norm validity is enough to avoid crime. Nobody believes that legally banning theft and punishing non-dissuaded offenders results in a theft-free society. Expectations should also be cognitively protected, and for that reason bicycles should be properly secured and locked to avoid theft, regardless of the fact that a norm protects our expectations that our bicycles are not going to be unlawfully taken. Put differently, nobody will rely on the validity of a norm which is regularly violated. Law cannot guarantee that our expectations cannot be frustrated. What law *can* guarantee is that our expectations will be maintained, as expectations, even in cases of disturbance and it will act accordingly.

Let me explain this sociological concept of norms as institutionalized social expectations, taking rape as a prototypic crime at the nucleus of criminal law. Those legal moralists who speak in terms of declarations of public wrongdoing and *ex post facto* censure in public trials as justification for the enactment of the Sexual Offences (Scotland) Act 2009 have a distorted view of the function of the criminal law. The primary function of the law is not justification of punishment. The primary function of the Act, according with a more sociological approach, is to prevent and reduce rape and other sexual offences guiding sexual behaviour. After the enactment of the Act, men in particular found

[288] See N. Luhmann *Law as a Social System* (2004) at p185. See also N. Luhmann *Social System* (1995) at pp292-294 and 303 – 307

themselves "epistemologically guided" about the new standard of normative institutionalized conduct expected in their sexual relations. In the new broader definition of rape the range of circumstances where, for example, consent will not be considered to be present imposes new non-optional duties in sexual behaviour in order to control, guide and to plan living out of court.[289] According with the sociological approach here defended it could be interpreted that the primary aim of the new legislation[290] was to meticulously let citizens know the normative institutionalized sexual behaviour expected from them. The *factual symmetry* of legal rules highlighted above implies that males have to conform to the new range of circumstances where consent will not be considered present (regardless of their personal beliefs about the public wrongfulness of the conduct). But additionally, and more importantly, potential victims can act with assurance that their expectations about male behaviour will be accomplished or otherwise the validity of the norm will be restored by punishment.

This was, for example, the aim of the rape prevention campaigns launched in Scotland coordinated with the enactment of the Sexual Offences (Scotland) Act 2009. The campaign "we can stop it" highlights the changes in the Act which attempt to reverse the popular trend of focusing rape prevention messages at victims, instead focusing the message on potential offenders. As a counterpart, the campaign "this is not an invitation to rape me" reinforced women's sexual freedom. The campaign stated that a woman can expect males to conform to the new prescribed sexual conduct regardless of the clothes she is wearing, her drinking behaviour or the 'mixed signals' given after consenting to any level of sexual activity. This implies that knowledge of the valid law is not only highly relevant for potential rapists but for potential victims as well. Only knowing the valid legal framework can we build up flawless expectations about others citizens´ behaviour. In conclusion, we have first categorically rejected the legal moralist approach towards the irrelevance of legal knowledge. We then partially backed the legal positivist argument that knowledge of the law is essential in a proper deliberation process. Finally, highlighting the significance of the sociological dimension of law lacking in the positivist account, we formulated a new conceptual framework where legal norms are not only reasons for action but also *institutionalized social expectations*.

[289] See section 12-15 of the Sexual Offences Scotland Act 2009
[290] In addition to the new case law emanates from courts after its enactment

2.7 Conclusion

In this chapter 1 have discussed the diametrically opposite approaches that legal moralists and legal positivists have towards the significance of knowledge of the law. It has been explained why retributivist/moralistic accounts, founded on the connection between wrongdoing and punishment, have pushed any cognitive conditions into the background.. The flaws of the argument that culpable wrongdoing (no legality) justifies a desert-based reason to punish were also fleshed out. Finally, a comprehensive historical review of the position held by moralists about cognitive conditions as well as a criticism of this attitude was conclusively expounded.

Then, the chapter supported the ability of the law to rise above merit-based discussions and *ex-ante* guidance to citizens. The positivist 'guidance view' argument was also supported on the basis that, as rational beings, it is undeniable that we engage in a balance of reasons before acting, and law is a relevant condition to our practical reasoning. At the same time, the excessive prominence that both the coercive dimension of law and the concept of authority have in positivist accounts has been denounced: we are deliberative agents but also social beings. The chapter concluded by postulating a new sociological core for the construction of a modern criminal law. Legal norms are reasons for action but also institutionalized normative social expectations. A reassurance that our expectations will be maintained even if thwarted is the baseline for frictionless social interaction and the minimum threshold for interpersonal trust.

The suggested socially grounded institutional understanding of the criminal law sketched above requires nonetheless a solid justification and expansion. To claim an indispensable sociological dimension of the criminal law is a vague and broad purpose that demands theoretical maturity in order to be feasible. This new conceptual framework is the aim of the next chapter where a proposal founded on the theory of social institutions is introduced. This new institutional theory of law needs, additionally and in order to succeed, to provide new meaning to cognitive conditions. In doing so, this renewed account should be able to provide a fertile theoretic basis where a principled, fair and coherent solution where false normative and factual beliefs can thrive.

CHAPTER 3

CONCEPTUAL INSTITUTIONAL FRAMEWORK

3.1 Introduction

In the last chapter the differing approaches taken by the legal moralist and positivist schools of thought towards the relevance of knowledge of the law was scrutinised: whereas for the latter knowledge was key, for the former it was irrelevant. It was criticised that law was neither a divine gift written and innately understood in our hearts, nor are legislators to be regarded as intrinsically knowing what is right or wrong. We were equally sceptical of the *aprioristic* and merely rational theory of knowledge grounded exclusively in the model of legal norms. As an alternative to *quid sit iuris* (what is law), a more sociological-normative perception was proposed. This chapter aims to set out a fresh institutional framework expanding on that proposal by implementing an institutional approach to law and its knowledge. From the institutionalist concept of law here defended, knowledge of the law is not mere understanding of legal norms but the awareness of complex institutional facts and institutional structures and the social order it brings about.

This proposal is based on the theory of social institutions formulated by Searle[291] and embraces institutional legal positivist arguments developed by MacCormick[292] and Weinberger.[293] By doing so, the paper engages with the current trend of some scholars, like Lacey[294] or Farmer,[295] to take a more sociological approach to legal phenomena. With this structural shift, these scholars bring back sociology and other social sciences from empirical fieldwork to the legal theoretical arena. In the criminal field, and focused in theories of criminalisation, Farmer has also defended the salient relevance "of what makes

[291] J. Searle *The Construction of Social Reality* (1995); J. Searle *Making the Social World: The Structure of Human Civilization* (2010)
[292] N. MacCormick *Institutions of Law: An Essay in Legal Theory* (2007). MacCormick "Law as Institutional Fact" in MacCormick N, and Weinberger O, *An Institutional Theory of Law* (1986). See also the essays in M. Mar and Z. Bankowski (eds) *Law as Institutional Normative Order* (2009)
[293] O. Weinberger *Law, Institution and Legal Politics* (1991)
[294] See N. Lacey "Institutionalizing Responsibility: Implications for Jurisprudence*" Jurisprudence* (2013)1:7. N. Lacey *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (2016).
[295] L. Farmer *Making the Modern Criminal Law: Criminalization and Civil Order* (2016)

the law criminal, or the distinctive character or aims of the criminal law".[296] After asserting that the current theories of criminalisation have failed *"to attend the purpose of criminal law",* he stresses the unavoidable social functionalist perspective that any theory of criminalisation must bear. Consequent with this viewpoint, Farmer frames his theory of criminaliszation in the understanding of law as an "institutional normative order",[297] supporting the legal institutional theory of law developed by MacCormick.[298] A proposal of this kind, within the boundaries of a "sketchy"[299] and lofty purpose of securing the conditions of civility and social peace,[300] will verify the relevance of the function in the identification of criminal law *qua* criminal law, and not only the way the functions are fulfilled. This purposive approach reinforces Lacey's proposal that sociological changes in the legal phenomena have to have an impact in law's modality.[301] This thesis, grounded in the sources referred to above, attempts to formulate an innovative institutional theory of law that operates as the theoretical framework for a fresh solution for false beliefs.

The research starts by defending the view that modern societies exist within a constellation of institutional facts. For purposes or *functions* beyond mere biological or physical structures (brute facts), we collectively attribute a certain *status* to persons, objects or other entities. The institutional structure derived from these *status-functions* encloses a waterfall of deontic-normative powers that provides status holders with a common reason for action in our practical reasoning. Institutional facts guide us but also disclose to others what they can expect from us. Only within normative frameworks of reciprocal and *conventional expectations* can we interact, cooperate and trust strangers. But recognition and reciprocal acceptance is not everything. Where some institutions can effectively subsist under the normative structure provided by social habits or conventional expectations, others, in order to achieve their function, need a more formal authority-based

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[296] L. Farmer "Criminal law as an institution: Rethinking Theoretical Approaches to Criminalization" in A. Duff, S. Marshall M. Renzo , V. Tadros *Criminalization: The Political Morality of the Criminal Law* (2014) at p2

[297] L. Farmer *Making the Modern Criminal Law: Criminalization and Civil Order* (2016), Chapter 2

[298] See N. MacCormick, *Institutions of Law. An Essay in Legal Theory* (2007). N MacCormick "Law as Institutional Fact" in MacCormick N, and Weinberger O, *An Institutional Theory of Law* (1986). See also the essays in M. Mar and Z. Bankowski (eds) *Law as Institutional Normative Order* (2009). See also O. Weinberger *Law, Institution and Legal Politics* (1991); M. la Torre *Law as Institution* (2010). See also N. Lacey "Institutionalizing Responsibility" *Jurisprudence* (2013) 1:7

[299] L. Farmer *Making the Modern Criminal Law: Criminalization and Civil Order* (2006) at p26

[300] Some authors highlight the descriptive nature of the concept of civil peace and its limited or too nebulous to provide guidance in the identification of law. See M. Ulväng "Criminal Law and Public Peace" in M. Mar and Z. Bankowski *Law as Institutional Normative Order* (2009) at pp137-141. See also V. Tadros, "Institutions and Aims" in M. Mar and Z. Bankowski *Law as Institutional Normative Order* at p93

[301] N. Lacey *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (2016)

normative structure in place. These formal/legal rules *institutionalise* new *expectations* of these previously informal practices

Thereafter, the chapter explores the uncharted potential connections between trust/trustworthiness and the criminal law. An innovative conception of the deliberation process is at the basis of the link between both notions. Citizens are rational thinkers with the ability to conform their behaviour to reasons, but also to consider the mental life of others in their deliberation.[302] We have the capacity to recognise that the deliberation of others will depend on expectations about what we will do. Thus, if we count on the deliberation process of others we can build up our plans based on our *expectations* of their responsiveness. This is the gist of *interpersonal trust*. But trust, although grounded in normative expectations, is not enforceable (or it would not be trust). Within specific institutional frameworks, normative expectations also need a mechanism of institutional reassurance to allow the institutional framework to survive. This function is performed by criminal punishment reaffirming *institutional trust*. Against those expectations whose disruption can jeopardise the institutional configuration of the society, criminal punishment reassures that the institutional framework is still valid even in cases of isolated violations. The legitimation of criminal law in this picture is defined later as the guarantor who secures the institutional identity of the society against those instances of conduct that contravene the general normative model of orientation or guidance in social interaction that the institutional structure defines.

If the main function of the criminal law is neither deterrence nor the justification of punishment, but instead the protection of institutionalised expectations and to reassure the institutional framework, a fresh account of criminal responsibility needs to be deployed. In doing so a particular emphasis should be given to the allocation of status that reshapes the concept of personhood in law. Only when an event happens within the status framework can the status-holder be held responsible for it. Status defines prospectively the responsibility of the holder in two ways: negatively, he is responsible for configuring his ambit of action by avoiding causal processes that, in creating a non-permitted risk, jeopardise the ambit of action or planning of others (*neminem laede* principle); positively, the holder is responsible for the deficient performance of any institutional function when interacting with others. This structure also embeds the two dimensions of trust: a) trusting

[302] This ability is known as the "Theory of Mind" and implies that we are able to attribute mental states to others (or oneself): we are able to understand that the rest of the members of the society have beliefs, emotions, intentions that are different from one's own.

somebody and b) trusting somebody in a particular domain. The conclusion of this scheme is a new classification of offences*: offences of association* and *offences of dissociation.*

Finally, the research illustrates the distinct ways knowledge of the law is relevant in the conceptual institutional framework proposed here: to interact in any institutional framework, the citizen needs to be aware of its deontic framework. To plan and organise our life around the expectations of others requires a deep knowledge of the social framework and equally the legal norms that shape it. But knowledge is also essential in the attribution of criminal responsibility. Criminal responsibility will be directly attributed when the citizen acts aware of the illegality of his behavior. But, when a lack of knowledge (normative or factual) precludes deliberation by the actor that their behavior could be criminal, the attribution of criminal responsibility can be challenging.

3.2 Natural, gregarious and Institutional structures

Reality, 'the state of things as they actually exit', can be split into those qualities or features whose existence are autonomous from the perception of the observer, and those that are dependent on human attitudes towards the physical phenomena.[303] Frequently, the same reality can be constituted, at the same time, by qualities dependent and disassociated from the perception of the spectator. A ceilidh dance is a succession of physical movements performed by the physical bodies of the participants, but it is also the result of the attitudes and purposes of the dancers according with rules consensually pre-established. We can designate, following Searle[304] and Anscombe,[305] *brute facts* as those facts disassociated from the perception or belief of the witness, and *institutional facts,* as those phenomena related to the awareness of the spectator.[306]

Let me delve into this ontological approach of reality by scrutinising the alignment of objects or entities.[307] Intermolecular attraction (or repulsion) is a natural fact that occurs between neighbouring particles due to their different electric or magnetic dipole. Dipole

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[303] G.E.M. Anscombe "On Brute Facts" *Analysis* (1958) 18:69–72. J.R. Searle *Speech Acts* (1969). J.R. Searle's work continues through *Expression and Meaning: Studies in the Theory of Speech Acts* (1979); with D. Vander-veken, *Foundations of Illocutionary Logic* (1985), and *The Construction of Social Reality* (1995).

[304] J Searle *Making the Social World: The Structure of Human Civilization* (2010)

[305] G.E.M. Anscombe "On Brute Facts" *Analysis* (1958) 18:69–72

[306] It is unnecessary to say that only one reality actually exists.

[307] I should highlight the intentional similarity of the examples used here with MacCormick's seminal queuing example.

electrostatic interactions tend to *align* the molecules to increase attraction, thus, the positive end of a polar molecule will attract the negative end of the other molecule and influence its position. A good example of *alignment of particles* and its effects is frozen water; liquids always shrink when cooled down but water surprisingly always expands. Water always increases volume when frozen due to the special nature of hydrogen atoms: a physicochemical phenomenon known as a hydrogen bond.[308] When cooled down and frozen, water expands because of the special alignment hydrogen and oxygen atoms take that allows empty spaces between them. For that reason, *orderly* frozen water occupies more space than *disorderly* warm water. Under the laws of science or nature we describe such phenomenon as *natural structures*.

Migratory birds, like geese and ducks, also *align themselves*. They use V-shaped flight formations to boost the efficiency and range of flying. The upwash from the wingtip vortices of the bird ahead assists each bird behind to support its own weight, thus assisting each bird to fly except for the one at the very front. In contrast to hydrogen bonds, every bird of the flock collaborates intentionally (or perhaps, instinctively) in the collective action of flight. In order to spread the flight fatigue among the flock members, birds flying at the tips relieve cyclically those at the front of the formation. In a V-shape formation, the birds make available to the whole flock their body as a mere physical structure, with the purpose of improving efficiency and increasing the range of flight. The same behaviour might be found in a group of trekkers who, during the night, align their sleeping bags together to generate body warmth in cold weather. In each example the physical structure of the bodies are resourcefully used. We can name such instances of this phenomenon as *gregarious structures.* It cannot be mathematically formulated like the hydrogen bond because some element of freedom and self-determination is involved. No obligations, duties, rights or expectations are created among the members. Any goose or trekker is free to join the group and share the benefits of the cooperative conduct, or leave the structure to migrate or sleep alone at his own risk.

We also *intentionally align* ourselves sometimes for purposes beyond our physical or biological features or mechanical structure. A recognized and successful practice in our crowded societies is queuing or waiting in line. Like our previous examples, a queue is the

[308] The special nature of hydrogen atoms, which do not have an inner shell of electrons, makes it easily accessible for strong dipole interaction with the lone pair of electrons of the atom of oxygen. This interaction is called a hydrogen bond and exists between a molecule that contains a hydrogen atom attached to an electronegative element and another molecule containing a lone pair of electrons on an electronegative element, oxygen in the case of water.

result of the alignment of biological bodies or physical entities. Nonetheless, in the case of forming a queue, the purpose or function assigned cannot be performed just by virtue of the physical or biological features but also necessarily by the collective attribution of a certain *status* to the human body. Only once this *status* has been collectively recognised by a certain society or community or group of people can the *function* can be successfully performed. In the mutually coordinated practice of queuing, the "function-status"[309] collectively assigned to a line of human bodies is that of *"first come, first served"*. The function assigned to the queue is operative insofar as the people involved in a particular activity, for example queueing for a bus, recognise and accept that a line of human bodies has the function-status of "first come, first served". Its existence is not autonomous from the users but rather depends on the perceptions and attitudes that observers (or anyone willing to take the bus) have towards the physical phenomena. In Searle's terminology this assignment of status and functions takes the form "X counts as Y".[310] When the practice to consider X as Y becomes collectively recognised it constitutes an *institutional structure.*[311]

Institutional structures are fictional and thus ontologically subjective.[312] They only exist in so far as they are collectively believed to exist and cannot subsist unless a community collectively recognises them as existing. Slavery illustrates a good example of an institution that was once recognised and accepted but collapsed when the social support for the institution vanished. On the other hand, same-sex marriage might provide a current example of an institutional structure that collective intentionality has promoted to materialise as an extension of genuine equal rights across the entire community. This allocation of status-function is an exclusive human feature. Only humans can impose that the union of two persons generates a special status where the holders can perform functions beyond their physical or biological structures. Geese can create gregarious structures but only humans can create institutional facts that exist only within human institutions.

The allocation of functions beyond the physical structures of persons, objects and other kind of entities allows human societies to expand the efficiency and range of human existence. Without institutional structures we would be a gregarious society/structure but not an institutional one. Our reality, without institutions, institutional structures and

[309] J. Searle (2005) "What is an Institution?" *Journal of Institutional Economics* (2005) 1: 1-22 at 7.
[310] J. Searle *Making the social world: The Structure of Human Civilization* (2010) at p10
[311] Ibd Chapter 5
[312] In contrast, natural reality is ontologically objective.

institutional facts, would be constituted by mere physical objects (brute facts), valued only by their substantial or biological or mechanical features. Institutions, thus, are essential devices for the creation, regulation, cooperation and organisation of relationships between humans. Property, marriage, courts, the Crown Prosecution Service, but also bank holidays, the Edinburgh Marathon, the football league, friendship, love affairs and citizenship are all common institutional structures in our modern societies. According to the above propositions we can claim that human societies have an institutional identity where *"status-functions"* are the glue that holds human societies together".[313]

What, then, is the content of an institutional structure if it exists beyond the biological or physical features of the person or object that constituted it? We emphasised above that institutional structures are fictional and its ontology subjective. In fact, a specific group of people who usually queue to take the bus can mutually agree to assign the function-status "first come, first served" to their umbrellas when it rains. The function-status assigned now to the 'queueing' umbrellas, if a minimum threshold of compliance is reached, allows the passengers to orderly queue while taking shelter as a disorganised group of equals. In Spain, where queues are not always seen as an efficient way to organise users who want to be served, it is common for the server to begin the custom by asking who is first, with that customer then "passing over" to the next person who arrived after them who will in turn pass over to subsequent arriving customers, etc. The function-status can be attributed, subsequently, to persons or objects or even simple spoken phrases, insofar as a particular society assigns them some status and their performed function is accepted and recognised as a result of the assigned status. The first to come and orderly leave their umbrella in the line will have priority over those who arrive behind him in the formation. Aside from the weather conditions, very little changes!

From the above examples detailing the (re)allocation of function-status, we can conclude that what is salient in building institutional structures is the *deontic framework* they create.[314] The function "first come, first served", allocated to an object or person to give it an institutional function, produces a waterfall of rights, duties, expectations, responsibilities, permissions, requirements and so on. This deontic structure will be held to be valid and situated within society as far as they are generally recognised, irrespective of those outlier cases where certain individuals act motivated not by the deontic structure, but

[313] J. Searle "What is an Institution?" *Journal of Institutional Economics* (2005) 1:1-22 at p9
[314] See J. Searle *Making the social world: The Structure of Human Civilization* (2010) at p8

by their own personal agenda. In fact, habitually, even those who purposely behave outside the institutional deontic framework recognise as worthy the status-function they contravene. A thief certainly recognises property as a positive social institution and expects others to respect his belongings, despite his concurrent motivation to steal, brought about by the personal benefits that stealing brings to him.

This deontological framework provides members of the society with a reason for action in a particular way. Institutional deontology influences our behaviour. Any time a member of society rationally deliberates, as a reflective agent, about what to do or what they ought to do, the institutional structures provides a reason to act in the way allocated by that structure because it is the manner in which this particular society has collectively recognised how to act. When we recognise a line of human bodies as the legitimate mode to queue for a bus, we are ruling out other alternatives at the same time as limiting our range of freedom. The recognition of the deontological nature of these institutional structures constrains our options for acting within the specific institution. Nevertheless, at the same time it allows other users to know what they can expect from us. This mutual recognition and participation in the institutional framework strengthens its deontic structure.

Institutional structures play a primary role in our practical reasoning and deliberation in the moment of action. They are considerations that we take into account in our thoughts as sources of motivation;[315] they guide us about how to behave in society but also disclose what others can expect from our behaviour, necessarily prescribing our ambit of responsibility. As Weinberger emphasises, institutions are frameworks of human action determined by information.[316] Undoubtedly, not everybody is motivated to act within the deontic framework defined by the institution. Some citizens skip the queue; other citizens are dishonest with friends and some citizens rape. But these behaviours, despite existing outside the deontic framework, are not incompatible with the recognised institutional deontology.

It goes without saying that some kind of organised coercion or enforcement may be necessary to support and sustain some institutional frameworks. But the success of our sophisticated institutional reality does not just depend on the coercion or enforced

[315] More was said above in chapter 2 about motivation and reasons for action and externalism v externalism.
[316] O. Weinberger *Law, Institution and Legal Politics* (1991) at p21

punishment of those who behave outside the institutional framework. Institutional frameworks thrive and achieve their goals because we *expect* that the rest of the status holders will behave within the deontic institutional framework as well. The success of bus queuing resides in the expectation we have that other bus users will behave in the same way and not just in the conviction that queue-jumpers will be punished.

3.3 Categorical, conventional and institutionalised/normative expectations

Water *always* expands when frozen. The way we as humans are, and our biological constitution, is very much like the hydrogen bond's natural structure. As human beings there is nothing we can say (or do) to change or to constrain it. We can only cognitively adapt our existence and behaviour to natural facts, like the hydrogen bond. Hydrogen and oxygen electrons will always act in the same way under specific conditions of temperature and pressure. In this respect we might say that they are 'not free', and this assumption restricts its range of possibilities. For example, we can causally control the way water freezes. That is, we can add salt to fresh water to modify the hydrogen bond effects. We can, then, conclude that natural structures produce *categorical expectations* in the observer. The observer cognitively processes these expectations, developing an understanding of the phenomena and modifying their future behaviour accordingly. The expectation is created without any other input.

On the other hand*, institutional structures* do not limit the freedom of citizens in the same way. This is because despite the collective recognition of a status function by society, citizens may nevertheless be motivated by reasons to act other than those provided by the institutional framework in specific circumstances. Some citizens may accept the status function collectively recognised but they are motivated to act by personal, self-interested advantages in a given situation. The collective acceptance and recognition of the deontic institutional framework does not prevent free conscious citizens from violating the rules when using the institutional framework. In this way, institutional structures produce in the observer or user *conventional expectations*: the expectation that users of the institution will respect, and consequently behave within, the deontic framework provided by the institutional structure.

So far, we have mentioned and discussed an essential and everyday institutional structure grounded in mutual and reciprocal recognition and acceptance: queuing. The

deontic structure inherent to the status function of this institution is based on reciprocal social conventions. Any accountability or authority relationships are deregulated. Some institutions can exist, and effectively and efficiently subsist, under the deontic structure provided by conventional expectations, social habit, norms of etiquette, or good manners without further formalities. Nevertheless, our modern sophisticated society is far more complex than the conventional and unregulated bus queuing practice. Collective recognition and acceptance is not everything. As MacCormick illustrates,[317] queuing is not only an informal order grounded in social reciprocal acceptance.

In some environments, to achieve the function 'first come, first served', some progression from merely informal practices to more formalised ones have been put in place. For example, when travelling by air it is common to find both priority and non-priority queues, so that the last to come might be the first to be served. Numbered tickets can be provided in order to deliver more freedom of movement and avoid disputes. Also, a person assuming authority can be put in place to deal with repeated problems or to resolve disputes between users. Furthermore, someone in a position of authority can establish oral or written formal rules and procedures that must be known by the users in order to appropriately use the institution. Thus, various layers of overlapping pre-assigned function statuses form our complex human society. We live in a world institutionally pre-conformed where we need to learn the way institutions work to subsist and progress. A deficit of knowledge of the deontology of institutions will affect our ability to succeed, and thus success in life depends enormously on our ability to successfully know, comprehend and learn the deontic framework provided by institutions. In our airline example, those who ignore that the recognised way of boarding a plane is by queuing in the correct line will probably be prevented from boarding until they joined the appropriate queue. The same result will await those who erroneously believe that some other non-recognised practice will allow them to board the plane.

These sophisticated and official rules differ formally from the original constitutive rules of the institutional structure. Formal rules are issued by someone with authority and are usually mandatory in order to use the institution. There could be, subsequently, at least two kinds of rules in developed institutional structures: informal, implicit, constitutive rules that signify conventional expectations; and precise, explicit, decision-making

[317] Chapter 2

authority rules that signify *normative (institutionalised) expectations.*[318] These explicit, authority-based rules institutionalise expectations that were formerly merely implicit, constitutive rules (conventional expectation) or issues that developed and institutionalised new institutional expectations: new layers of overlapping function status. Of course, conventional expectations can also remain unchanged and valid within the institutional structure because they are recognised but not formally institutionalised. In short, in some institutional structures, the initial conventional deontic structure can evolve (although some can remain unaffected) towards a formal-explicit institutional framework grounded in authority-based rules.

MacCormick's concept that this transition from mere conventional to institutional expectations is the substrate of law as an *institutional normative order*[319] is probably true. Besides the informal and conventional expectations generated by the practice itself, there also arises the practice of authorising some decision-making individuals to make explicit and formal decisions. As MacCormick claims, "There are now, we may say, deciding-about-queuing norms, as well as the queuing norms themselves".[320] In our terminology, the latter generate conventional expectations and the former legal (institutionalised) expectations. This transition also implies a conversion from an informal, deontic framework to a more prescribed, normative framework. In this structured, more-than-one-tier setting proposed by MacCormick, however, new formalised practices (rules) are not discoverable in nature (like the hydrogen bond mentioned above), they are also a status-function whose deontic powers derive from a collectively recognised and accepted status. The function that the ticket roll accomplishes, the "authority" that a taxi-marshal organising taxi-queues performs, and the formally articulated rules enacted or enforced by those with the status of authority are examples of status-function itself: they are institutions within institutions. However, conventional and normative–institutionalised expectations require citizens to have a particular kind of attitude towards one another in the institutional structure for it to endure. Mutual, reciprocal and recognised acceptance would not be possible without some degree of reliance or confidence on each other.

3.4 Expectations, trust and criminal law

[318] MacCormik refers to this structure as two-(or more than two) normative tier. See N. MacCormick, *Institutions of Law. An Essay in Legal Theory* (2007). at p23
[319] M. Mar and Z Bankowski (eds) *Law as Institutional Normative Order* (2009)
[320] MacCormik refers to this structure as two-(or more than two) normative tier. See N. MacCormick *Institutions of Law. An Essay in Legal Theory* (2007) at p23

Imagine a world without trust – it would certainly be a world without institutional structures. Trust is an essential attribute of the institutional organisation of modern societies. The concept of money provides a good example. Only in an atmosphere of mutual interpersonal trust can institutional structures succeed. We are social creatures and human coordination and cooperation depends on trust because we cannot do everything at every time and everywhere by ourselves. However, trust, understood as a kind of reliance attitude, always implies making ourselves vulnerable to others. Trust always brings the risk of being unwarranted. We can only assess our *expectations* about the trusted matter because, once we trust, we lose control over the actions executed (or not) by the trustee. In fact, if we had the absolute guarantee that the trustee would perform the trusted matter, we would not have the need to trust him. With trust being such a complex attitude, can the (criminal) law endorse the atmosphere of interpersonal trust that the institutional structures need to succeed? In other words, can the (criminal) law make us appear trustworthy to others? Or finally, can the (criminal) law reassure the institutional structure itself?

Both the philosophical interest and literature about trust have grown massively in the last few decades.[321] The idea of trust as a key element in civility or social order has also been a recognised topic in sociology from early thinkers like Durkheim[322] or Simmel,[323] to consecrated sociologists like Luhmann. [324] However, no consistent conceptual interconnections have been made between trust and law. Literature about this topic is normally focussed or deals with aspects of legitimacy related with procedural criminal justice or police.[325] In any case, both legal moralists and positivists would restrict the influence of trustworthiness to the effects of criminal punishment. MacCormick has discussed interpersonal trust in his account of law as a normative order. He connects trust with civility when he affirms that "[…] peaceful relations among persons who can trust relative strangers to avoid violating their persons or their property are fundamental conditions of civility".[326] For MacCormick, civility or civil society is the opposite to the

[321] A.C. Baier "Trust and Antitrust" *Ethics* (1986) 96(2):231–260. D. Gambetta "Can We Trust Trust?" in *Trust: Making and Breaking Cooperative Relations* (1988) pp213–237. T. Govier *Social Trust and Human Communities*. Montreal (1997). R. Hardin *Trust*: *Key Concepts in the Social Sciences* (2006). M. Hollis *Trust within Reason* (1998). M. Kohn *Trust: Self-Interest and the Common Good* (2008) N. Luhmann *Trust and Power: Two Works*. Translated by H. Davis, J. Raffan, and K. Rooney (1979). O. O'Neill *A Question of* (2002)

[322] E. Durkheim *The Division of Labour in Society* (2013(1893))

[323] G. Simmel *The Sociology of Georg Simmel* (1950) *The Philosophy of Money* (1990)

[324] G. Luhmann *Trust and Power* (1979 (1968))

[325] N. Persak *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (2014)

[326] MacCormik refers to this structure as two-(or more than two) normative tier. See N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) at p208

Hobbesian "state of nature",[327] it is a condition where complete strangers can interact and cooperate "having no special reasons to fear violence from those they happen to meet".[328] In this orderly environment complete strangers can take part in trade, exchange or political debate, and their divergences can be solved without resorting to self-help violence. Farmer, in the conclusion of his book, also proposes that the criminal law secures civility"[…] establishing measures for building and reinforcing trust between individuals. In substantive terms, this order has been secured by establishing rules for the conduct of social of life in an increasingly diverse range of activities. This might take the forms of a response to actual or threatened disorder, or clarifying responsibilities in relation to potentially harmful conduct, or establishing rules for coordinating complex social interactions".[329] But theoretical reconsideration about the relevance of a potential interdependence between trust and substantive criminal law is missing in the criminal law literature. This section will attempt to contribute to this debate, and to do so, we need first to dissect the complex concept of trust and thereafter explain the way the criminal law endorses trust within the institutional framework.

We discussed above that we can causally control *natural structures*. They generate *categorical expectations* that any observer needs to cognitively process and understand in order to successfully exist, but nothing else. In any case, natural structures have neither the ability to control their own behaviour nor the ability to anticipate the behaviour of others. Conversely, migratory birds have the capacity to modify their behaviour, taking in account the behaviour of others. Ducks and geese align themselves instinctively or when they perceive some physical signals from other birds in order to boost the efficiency of flying. They can modify their conduct reacting to the behaviour of the rest of the flock. This anticipatory comportment can be evidenced both in the interaction between ducks but also with others. If, for example, the flock notice the presence of humans with guns in a particular area, they may modify their route of flight. This ability opens up complex levels of interactivity between migrating birds. In fact, these levels of interactivity and anticipatory behaviour are common within the animal kingdom.

However, there is a sharp difference between the deliberation process of humans and animals: humans not only make decisions anticipating the behaviour of others, but are also able to take into consideration the mental life of others in their practical reasoning. At

[327] Ibd at p73
[328] Ibd at p73
[329] Ibd at p299

zebra crossings a dog will always stop if a car is approaching whereas a human will cross. We as humans can take into consideration in our practical reasoning that we can count on the deliberation process of others,[330] and for that reason we can build our plans on the *expectation* of their mutual responsiveness. Coming back to the guidance view proposed by legal positivists, we can conclude that it does not provide an answer to this puzzling theoretical environment. Upholding that legal norms are (exclusionary) reasons for action in our deliberation process is short-sighted in scope. In our deliberation process we are also able to take into consideration the mental life of others. When making our own deliberations we can count on the deliberation process of others with the expectation that they will comply with the legal norms and behave accordingly with this expectation. This is the sociological essence missed by legal positivists and precisely the gist of *interpersonal trust*.

This argument is well condensed in Jones' concept of trustworthiness when she asserts that only we as humans "[…] have the cognitive capacity to take into account in our deliberation the fact that another agent's deliberation rests on assumptions about what we will do […].[331] We are social creatures and our attitudes towards one another are essential to foster trust. As reflective beings we understand this; we are aware that others can be a source of opportunity or betrayal. Regardless, we need others because we can only survive in cooperative social environments. As deliberative beings, we also have the ability to take into consideration, in our own practical reasoning,[332] the expectations and intentions of others. In other words, we can take into consideration in our deliberation process before action the fact that others count on us.[333] The direct consequence of this capacity is that the achievement of our plans sometimes depends on the conduct of the person we count on. We make ourselves vulnerable to them and at the same time they are aware that the achievement of our goals is contingent on the actions they take. At the end, each of us know that the other is able to take into account the ways in which the success of our actions depend on what others will do.[334] As a result, we consider in our future actions that others will respond to our manifested dependency on each other.[335] Trustworthiness represents an aptitude to take certain other's trust in you as a reason to act as trusted. The

[330] See T. Scanlon *Promises and Contracts*. Reprinted in *The Difficulty of Tolerance* (2003) at pp239-240
[331] See K. Jones "Trustworthiness" *Ethics* (2012) 123:61–85 at p63
[332] See P. Pettit *The Common Mind: An Essay on Psychology, Society and Politics* (1993) pp54–76
[333] K. Jones "Trustworthiness" *Ethics* 123 (October 2012): 61–85 at 64
[334] Ibd at p64
[335] This account of trustworthiness is known as trust responsiveness. There are also other accounts of trustworthiness to justify trust, like those that focus on goodwill. A wider debate about such accounts is beyond the scope of this thesis.

fact that I am trustworthy to someone is a reason for me to react to the other person's dependency in the way he relies upon me. Thus, my trustworthiness (to you) and your trust becomes a trigger for me to act as trusted.

However, trustworthiness requires something more than just positive (or predictive) expectations that others will respond to our recognised dependencies. If my neighbor usually prunes our common bush fence every spring without any formal agreement I could be disappointed if, one year, he decides not to do it, but I should not feel betrayed. To trust others we need more than potential projections of habits or predictive expectations. We take some stance[336] towards others that demands a particular behavior from them because this is what they *should* do. To trust we need normative expectations, which implies some link of accountability between the expectation and our reliance;[337] a reassurance that our expectations will be protected in case they are not lived up to by others. This element of responsibility is well conveyed in Walker's concept of trust:[338] "[…] a kind of reliance on others whom we expect (perhaps only implicitly or unreflectively) to behave as relied upon (e.g. in specified ways, in ways that fulfill an assumed standard, or in ways so as to achieve relied-upon outcomes) and to behave that way in the awareness (if only implicit or unreflective) that they are liable to be held responsible for failing to do so or to make reasonable efforts to do so". Trust implies then the possibility to act negatively, attaching blame (not just disappointment) in cases where the trustee does not live up to expectations. Trusting implies a judgement that the other will act in the way relied upon because he realises that this is how he *should* act.[339] Therefore, trustworthiness requires both the knowledge that we can rely on others, and cognisance that we can be held responsible if we do not live up to others' expectations. Moreover, Jones, in her 'responsive' concept of trustworthiness,[340] points to this normative extension of trust in particular domains: "B is trustworthy with respect to A in domain of interaction D, if and only if she is competent with respect to that domain, and she would take the fact that A is counting on her, were A to do so in this domain, to be a compelling reason for acting as counted on." This compelling element 'to behave as relied upon' links the fulfillment of the expectation with

[336] R. Holton "Deciding to Trust, Coming to Believe" *Australasian Journal of Philosophy* (1994) 72(1):63–76. P. Hieronymi "The Reasons of Trust," *Australasian Journal of Philosophy* (2008) 86(2):213–236. V. McGeer "Trust, Hope, and Empowerment" *Australasian Journal of Philosophy* (2008) 86(2):237–254.

[337] Relevant is the work of Scanlon on promises (there he picks out fidelity as the ground of promissory obligations). See: Scanlon T, "Promises and Practices" *Philosophy and Public Affairs*, in (1990) 19(3):199-226

[338] M.U. Walker *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (2006) at p80

[339] N .Eisikovits *The Conceptual Neighborhood*, Suffolk University (2015) at p77

[340] K. Jones "Trustworthiness" *Ethics* (2012) 123(1):61-85

the potential attribution of responsibility and the consequent blame in case of default. The implications of the two dimensions of trust distilled above – the neighboring (two-place trust structure) described by Walker and the 'three-place trust structure' defined by Jones – will be fleshed out later when a fresh account of personhood in law and criminal responsibility is defended.

Institutional structures require adherence to this reliance attitude to survive. Derived from the status function, they enclose a waterfall of deontic-normative powers that provide status holders with a common reason for action in their practical reasoning in two ways: institutional frameworks guide us but also disclose to others that they "*count on us"*. Within the institutional framework we all know that the success of our actions and the success of the institution's structure depend on what others will do. Only within normative frameworks of reciprocal and *conventional expectations* can we interact, cooperate and trust strangers, because we know that others consider the ways in which the success of our actions depend on what they will do. Furthermore, not living up to the normative expectations generated can lead to the attachment of negative consequences like blame or censure by other members of the institution. Some institutional frameworks can effectively subsist under the normative structure provided by 'pure' trust, social habits or conventional expectations. Social blame or censure should be a proportional response. However, for other more sophisticated institutional frameworks, in order to achieve their function, they need a more formal, authority-based normative structure in place. These formal/legal rules *institutionalise* new *expectations* or previously informal practices, conveying the compelling/responsibility element highlighted by Walker and Jones. However, they also incorporate, in some cases, new and more severe ways to protect our *now* institutionalised expectations.

Take the example of driving; an everyday social practice. We drive to work every morning surrounded by complete strangers who interact with us in a risky environment. Every driver is a biological human, a risky entity with its own degree of freedom of action. Nevertheless, we trust them. Irrespective of this *a priori* dangerous and uncertain driving environment, most of us are conscientiously calm drivers. We do not trust in each of the individualities we meet on the road with their purposes, preferences or personal reasons, nor could we trust the anarchy of completely anonymous strangers. Trust between drivers-status-holders arises because we share a deontic framework and it is expected that everybody will comply with it because we each know that others are counting on us to do

so. We assume that others will recognise and respond to our mutual and reciprocal dependencies. In this way, the driver-status-holder becomes someone distinctive for us. He becomes a driver who drives among drivers and, as result, we trust him because we expect him to act within the deontic framework. We are also aware that some negative effects could arise if the stranger trustee does not behave as relied upon. In some cases, administrative sanctions or criminal punishment could be attributed.

This dual dimension requires highlighting the distinction between the aim of *criminal (behavioural) norms* and the aim of *criminal punishment*. Criminal norms merely reformulate expectations. They are then a system of status functions that institutionalises expectations. The behavioural side of any criminal norm institutionalises the deontic powers inherent in any institutional structure. This institutionalising process implies a more meticulous and accurate description of the command or prohibited conduct than the mere recognised practice. For example, rule 195 of the Highway Code[341] outlines the obligation of a driver approaching a zebra crossing to give way when a pedestrian has "moved onto a crossing". Thus, the institutionalised conduct implies that drivers have no legal obligation to give way to pedestrians until they have stepped onto the road. Everyone using the institutional structure knows now the specific conduct expected. Institutional structure users are thus aware that the success of their plans depends on what those driving will do; in this case to stop when they step on to the road. In this way, criminal norms reassure and endorse *interpersonal trust* as we plan our behaviour according with the expectation that others will comply with the legal norms.

Criminal law also provides sanctions due to another inherent duality of the institutional deontic framework: a necessary collective acceptance as well as an acknowledgement of freedom of action among its users. Not every institutionalised normative expectation carries criminal punishment. Some kind of gradation exists in the process of institutionalisation. As aforementioned there are institutions with a highly legal pre-configuration, whereas others can only remain under conventional expectations, social censure and social blame. Compulsory enforcement, penalties, administrative sanction, or nullity of certain acts similarly ensures the validity of institutional expectations. Criminal law cannot guarantee that the expectations will be fulfilled. However, criminal norms communicate in advance that normative expectations will be maintained as expectations, even in cases of violation. Against those expectations whose violation can jeopardise the

[341] The Highway Code *Department of Transport* 1st October 2015

institutional architecture of the society, criminal punishment is justified. Criminal punishment has then the function to preserve, reaffirm and reinforce *institutional trust*: trust in the institutional structure itself. The essential nature of institutional structures for human societies justifies that, in order to reassure and endorse institutional trust, normative-institutionalised expectations will be maintained even in cases of violation of the deontic/legal institutional framework. Criminal punishment in this picture, attains its legitimation from the need to secure the institutional identity of the society against those forms of conduct that contravene the general normative model of orientation or guidance in social interaction that the institutional structure defines.

Finnis openly claims that the ability to understand the law requires an understanding of its functions[342]. It seems evident that in order to recognize the extension and nature of the law it is essential to take into account the hypothetical functions that the law can accomplish. However, knowledge of the potential functions of criminal law is not only key to understanding the nature of criminal law but, more importantly, is essential in order to appraise its quality. Ascribing functions to criminal law therefore establishes a standard by which its success can be evaluated. Only when the functions of criminal law have been fulfilled can we endorse its excellence (or not). The range of potential functions attributable to criminal law are as diverse as they are normative, because they depend on the ideological background of the observer: deterrence, punishment of wrongdoers… The above claim that the main function of criminal law is the protection of institutional expectations does not exclude other potential functions or effects of criminal law although, in any case, the research claims that this is the primary function of criminal law.

This fresh approach to the function of the criminal law requires unpacking. If the main function of the criminal law is neither punishment justification nor deterrence but the protection of legal-institutionalised expectations, a fresh account of criminal responsibility should be provided. This new interpretation should reflect the institutional framework deployed above. In doing so, particular attention should be given to the allocation of status that triggers the validity of the deontic institutional framework. Ascription of status reshapes the concept of personhood in law and the attribution of criminal responsibility itself. However, it must also reflect the two dimensions of trust highlighted above: Walker introduces what can be named as a 'two-place trust structure', defined as a kind of

[342] J. Finnis *Natural Law and Natural Rights* (2011) pp6-8

neighboring concept of trust, or simply a 'trusting somebody' view of trust. Although we very frequently 'trust somebody' in Walker's account, we often do not trust the same person to perform, for example, a specific task. We maybe trust our neighbors or friends but it does mean that we will trust them to perform the urgent appendectomy we may require. This 'three-place trust structure'[343] framed by Jones based on competence in the domain, emphasised that often reliance rests in the necessary abilities, knowledge or skills of the trustee. The next section will deal with the allocation of status within the institutional structure followed by a section returning to the attribution of criminal responsibility derived from the allocation of status.

3.5 Personhood in law and institutional status

At the beginning of this this chapter it was claimed that deontic and legal powers derive from the allocation of status to persons, objects and other entities. Judges, friends, brothers, citizens, lovers and marathon runners all have recognised institutional status. Status is the salient concept in the institutional structure because its extension guides both the holder and those who interact with him, and it is also a key point in the attribution of criminal responsibility. In this part we will focus our attention first on the allocation of status to persons and later we will return to the attribution of responsibility derived from status. The term status is usually used in jurisprudence as a legal expression to define grounds for differentiations of capacity like age, gender or nationality.[344] Status in the sense here advanced as a role, status-role, or role-attribution, has generally been neglected in legal literature. To find a developed theory of role-status we need to move on to the study of the social structures developed in the sociological field by American sociologists.[345] In the European debate,[346] the concept of social role was first introduced by the German-British sociologist and philosopher Dahrendorf,[347] who illustrated the difference between position and status-role: position is the place that an individual occupies in the social structure: husband, teacher, judge, etc. Status or role would be the constellation of expectations relating to a particular position. According to this approach,

[343] K. Jones "Trustworthiness" *Ethics* (2012) 123(1):61-85 at p62
[344] See N. MacCormick *Institutions of Law. An Essay in Legal Theory* (2007) at p97. O. Weinberger *Law, Institution and Legal Politics* (1991) at p193. See also H.L.A. Hart *Punishment and Responsibility*: E*ssays in the Philosophy of Law* (2008) at pp211-230
[345] See K. Lumpkin *The Family: A Study of Members Roles* (1993); R. Parks "Behind our masks" *Survey* (1926) 56:135
[346] R. Dahrendorf "*Homo Sociologicus*" in *Uni-Taschenbucher. VS Verlag fur Sozialwissenzchaften, Wiesbaden* (1964)
[347] Ibd at pp11-12

status brings together the collection of expectations related to the holder of a particular position. Status then becomes a cluster of conduct guidance for the holder as well as for those who interact with him. This line of argumentation, previously proposed by Durkheim[348], was introduced to the legal arena by Parsons[349] and especially by his disciple, Luhmann.[350] The German sociologist distinguished psychological systems from social systems, with 'communication' being a salient element in society. Law reduced chaos and disorder in communication stabilising with minimum standards and excludes other options that perturb social interaction. Chaos is stabilised by expectations that transform the contingent social coexistence by the order of the expected. In the communication the actors will know which expectation others have and what they can expect from them. We can only speak of society where law provides an expected normative oriented scenario.

From a more legal theory orientated approach MacCormick, dealing with personhood, distinguishes two kinds of normative attributes: normative position and normative relation. A human being (or a group of them) can have a normative position by the simple fact of being human, thus law interprets the biological human entity as a person in the legal sense.[351] This attribution provides the grounds, for example, for the recognition of Universal Human Rights. The other normative attributes are relational and reflect a logical connection between rights and obligations. Relational attributes imply that there is someone else with a corresponding counterpart attribute. MacCormick gives marriage as a good example of this relational normative attribution, except he affirms that it is a common feature of most normative attributes such as buyer/seller, employer/employee and so on. The one thing that is certain in MacCormick's suggestion is that personhood in law is a matter of institutional fact.[352] Furthermore, when he affirms, "[…] within the law, persons are defined and can occupy a variety of ever-changing legal positions and relation. To know of these is to have knowledge of institutional facts",[353] he is also claiming the social relevance of status in an institutional framework.

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[348] Similar arguments are implicit in Durkheim's idea of social order as normative consensus and division of labour: A system of rules and standards that define appropriate behaviour to avoid anarchy based on self-interest.

[349] For Parsons deviation means non-conformity with others' expectations justifying the attribution of responsibility. Deviation is not negatively defined as a conduct or behaviour, but implies a social relation between persons in conflict. Parsons' social action thesis states that social action arises as a result of interaction between actors. The actor plays a role (e.g. student or father) and the roles changes in different social scenarios.

[350] N. Luhmann *Law as a Social System* (2004) at p185. See also N. Luhmann *Social System* (1995) at pp292-294 and 303–307

[351] N. MacCormick *Institutions of Law An Essay in Legal Theory* (2007) at p53

[352] Ibd at p76

[353] Ibd at p76

Other legal philosophers have recognised the significance of status (roles) in our society. In *Punishment and Responsibility* Hart, in his categorisation of responsibility, identifies and describes roles and role responsibility extensively. For Hart, however, role has a very limited meaning that involves only duties or tasks to provide for the welfare of others, or to advance the aims and purposes of an organisation.[354] Following the same line of thought Baier defines role narrowly as a task or obligation to promote the wellbeing of another.[355] Both philosophers, defending this restricted concept of role as place or office in a social organisation or as a simple 'social role', disregard a salient feature of our social dimension: that in all the conduct we execute socially we are performing a status. Weinberger developed a more elaborate account of (legal) status,[356] recognising that individuals in groups take on certain roles in the community which are determined by normative regulations: "This role-play is a complex mixture of what must be done and what may be done, of tasks and authorisations, of demands and expectation, of taking and active part and adapting to others."[357] He presents role-play as the deontic framework here defended, but his concept suffers the effects of Hart and Baier' influence and its perception of status as a restricted 'social role' where we enter citizenship either automatically or by a deliberate act of will.[358] It is worth mentioning that Weinberger recognised that role-players are not only merely expected to adhere to specific standards of conduct, but it is also demanded of them.[359]

The institutional concept of status defended here rests on the fact that within our modern heterogeneous societies we are *'ordered freedom'*. The ambit and extension of our freedom is precast by social institutions. Freedom does not arise from our individual choice alone but is conditioned by a world previously institutionally constituted (although susceptible to modification and change). We must learn how this institutional reality operates before interacting with it. It is during this learning process that some degree of our genuine personal identity vanished as the price of being allocated with a status entitling us to the use of

[354] H.L.A. Hart *Punishment and Responsibility*: *Essays in the Philosophy of Law* (2008) at pp211-230
[355] Ibd at pp212-4
[355] K. Baier *Responsibility and Action* (1986) at p104
[356] Ota Weinberger uses the concept of role instead of status. See O. Weinberger *Law, Institution and Legal Politics* (1991) at p193
[357] Italics introduced by the author himself. See O. Weinberger *Law, Institution and Legal Politics* (1991) at p254
[358] Ibd at p254
[359] Ibd at p194

institutions and the enjoyment of its inbuilt deontic powers. This approach endorses in some way an institutionalized concept of personhood or at least legal personhood. The institutional structure of human society starts with this allocation of status. This recognition of status implies the attribution of legal rights and duties inherent to the status. Institutional functions can only be performed if the status is recognised and secured; conversely, only status-holders are authorised to perform institutional functions. Human societies need these socially created, objective structures to develop institutional functions and establish social standards and patterns for human conduct. As pointed out above, only within the deontic framework created by function status, fostering an atmosphere of mutual and interpersonal trust, can interactions between strangers take place. By assigning a particular status a stranger becomes known and reliable to us. As a result, those who do not act according to what is expected will be seen socially as misappropriated and diverted. Depending on the manner with which the status functions are performed by the holder, he can be regarded with social antipathy, socially excluded from the use of the institution, or legally sanctioned.

The inactive dimension grounded in the *neminem laede* principle substantiates the first category of criminal responsibility and the first principle of trust. The expectation exists that in the exercise of our individual orderly freedom we will take significant choices respecting others. In this inactive dimension the first intuitive standard would probably be that the agent behaves as a reasonable person. Gardner has illustrated how controversial this regularly assumed standard could be.[360] This anthropomorphic legal fiction, inheritor of the Roman *bonus paterfamilias,* represents the body of standards of care shaped by courts through case law. The reasonable person delineates a hypothetical person who exercises average judgement and care. Thus, it could serve as a comparative standard for determining criminal responsibility. However, this comparative standard reflects a majoritarian behavioural approach within a particular society and perhaps does not replicate the expectation that particular users of a particular institutional framework have. For that reason, it seems more acute to articulate a test that encompasses the minimum updatable knowledge required to interact legitimately in the institutional framework: a *collateral institutional user test*. In applying this test, judges and juries must take into consideration the institutional framework where users are interacting. In fact, they

[360] For an extensive discussion about the reasonable person see: J. Gardner "The Many Faces of the Reasonable Person" *LQR* (2015) 131:25

should position themselves within the institutional framework. From this perspective, as collateral institutional users, they must decide if the accused has lived up to reciprocal institutional expectations in the particular case under examination. Therefore, in those cases where new inputs do not trigger doubts in the agent's perception process about his beliefs, the applicable test should be an institutional user's standard. It should be decided through this objective/normative appraisal whether the behaviour of the agent falls below the standard of the ordinary user in his situation. Where in the first ECCR's requirement the appraisal was absolutely psychological, taking into account any characteristic of the citizen, the test proposed in the second requirement outlines a normative standard. So, in those offences of dissociation where the citizen disregards suspicions raised during the perception process about beliefs of brute facts, the agent will be criminally responsible. Where he persists on performing the on-going action he will be criminally responsible for the results of his action. Furthermore, when the information available to the citizen (updated with new stimuli) is insufficient to cast doubts or raise suspicions about his beliefs, the citizen will only be exonerated under a normative test. This normative test states that an accused will only be exonerated if the conduct of an ordinary institutional user with similar knowledge and under similar circumstances to the defendant would have had the same (false) belief.

Modern human societies are also founded on active social interaction and cooperation. Vital structures in our contemporary societies like political participation, social cooperation, financial transactions or business trading would not be possible without securement that their implementation is done professionally and competently. The proactive dimension of status implies that in planning our lives interacting with others or the natural environment it is necessary to secure the proficient and orderly development of the essential institutions. We need to trust the engineer who designs our car as much as he needs to trust his dentist. However, the status holder must also guarantee the existence of the institution and its continuity. For that reason, the status holder will be made responsible for a deficient performance of their institutional function(s). As a result of the above arguments, in this research we defend that in the case of *offences of association* the test should be stricter than the collateral institutional user test. Acting in the proactive dimension of status requires more skill and ability than the average institutional user. Consequently, the test applicable in cases where new inputs did not give rise to doubts in the accused about his beliefs should be in line with the standards required for a competent, skilful and proficient user of the institutional structure. However, opinions about a

competent and practiced use of the institutional structure can differ. In these cases the issue is again about the standard required. The solution should be in accordance with the function of the criminal law of protecting user's expectations. Thus, it should be enough to show that the decision taken was reasonable in the circumstances, regardless that other users' opinions could differ about the choice. As far as the expectations about the institutional structure are protected the choice should be admitted as adequate. This approach differs *in tempo* from the test applicable to offences of disassociation: the test for the former type of offences has a descriptive nature; it is about 'what was actually done' and whether or not the standard show was proficient. In disassociation offences the test is normative. It is about what should be done in order to fulfil the standard.

The exercise of our ordered freedom as status holders can be categorised into *inactive* and *proactive* dimensions. The inactive dimension, directly linked with the *two-place structure of trust*, implies the planning and performance of our conduct and actions according to the functions inherent in our status without disturbance of the circle of planning and organisation of others. Planning and acting within our status framework reaffirms to others that their framework of organisation will be respected. As status holders we must configure our ambit of action to avoid processes of action that intrude on the circles of planning of others. An expectation exists that in the exercise of our individual orderly freedom we will take significant choices respecting others. In this inactive dimension the first intuitive standard would probably be that the agent behaves as a reasonable person. Within this obligation to respect others and right of non-interference, condensed in the Roman *neminem laede* principle,[361] rests the essence of civil peace and social order. This inactive dimension (present in any status) assures the other members of the society that we will not create non-permitted risks that can jeopardise their orderly freedom. In this way we design and configure our quotidian conduct according to our categorical and normative institutionalised expectations.

Besides this constraining deontic/normative spectrum, as MacCormick highlighted above, status holders also have relational normative attributes. In fact the whole point of the creation and regulation of the institutional reality is to create and regulate relationships between people. Human institutional society is not just about people or objects invested or allocated with status, it is about people cooperating in performing and implementing social acts; it is about people's relationships and interaction within the deontic/normative

[361] Injure no one.

institutional framework. Nevertheless, contrary to the inactive dimension, the substantive content of these relational normative attributes is dynamic and proactive. The holder, performing the functions assigned by their status, intentionally intervenes in the planning and action of others voluntarily and *proactively*. This proactive dimension of status implies that in planning our lives interacting with others or the natural environment it is necessary to secure the proficient and orderly development of the essential institutions. We need to trust the engineer who designs our trains as much as he needs to trust his dentist. However, the status holder must also guarantee the existence of the institution and its continuity. For that reason, the status holder will be made responsible for a deficient performance of their institutional function(s). This proactive dimension of the status is interconnected with the "three-place trust structure"[362] framed by Jones based on competence in the domain. Often, trustworthiness is directly linked to the necessary abilities, knowledge or skills of the trustee. In this relational attribute, the institutional expectation is not the creation of non-permitted risks, but that the function status will be performed competently and proficiently "in [the] domain of interaction D".[363] The expectation is generated by the function assigned to the status; we expect that the status-holder will perform their functions as allocated by the status-function. As Weinberger argued, status is more than standards of behaviour put in practice; they "[…] are rules stipulating how these people are to conduct themselves in their roles".[364] The proactive functions inherent to a particular status involve improving, cooperating and expanding the ambit of planning and acting of other status holders. From the proposal here defended, this institutionalised expectation of the intervention of status holders in each other's ambits can be divided between a general and singular sphere. The former, based on inter-subjective solidarity, would legitimate the action in cases of serious risk for the integrity of others. Its performance would not require a big effort to implement and would be fundamental for the creation of a potential offence of pure omission that is actually criminalised.[365] The latter encompasses those proactive functions specifically included in the status function that the holder is obliged to implement efficiently. The supposed transgression of the function can be either the result of an action or an omission. Perhaps it is appropriate to clarify at this point that the inactive and proactive dimensions of status here defended do not have a straightforward relation with omissions or actions. Theft can be committed by active appropriation or by keeping

[362] K. Jones "Trustworthiness" *Ethics* (2012) 123(1):61-85 at p62
[363] Ibd at p63
[348] O. Weinberger *Law, Institution and Legal Politics* (1991) at p87
[365] A topic which goes beyond this research

the found property without forming a belief that the owner could not be found.[366] What is significant is the intervention in the ambit of organisation of others in the former case or the deficient or incorrect implantation of the functions allocated to the status in the latter.

3.6 Institutional responsibility

Responsibility has traditionally been conceptualised within the framework of wrong behaviour as the ability to respond or to answer. This concept of responsibility as accountability or answerability is for example claimed by Duff and Gardner. Duff, for example, argues that criminal responsibility should be constructed in terms of the reasons provided by the agent to his fellow citizens (relational responsibility) in relation to those wrongs that violate fundamental values of the political community (public wrongs).[367] Gardner, on the other hand, also supporting responsibility in terms of answerability, rejects the relational perspective defended by Duff, asserting that "all reasons are ultimately the same for everyone".[368] Even from a tepid institutional attitude towards criminal responsibility, Lacey also defends criminal responsibility as a social practice of calling to account.[369]

At least etymologically, those who defend a retrospective account of responsibility as the ability to respond are wrong. Re-spons-ibility derives from the Latin verb "*spondere*" meaning to promise, to offer, or to bind oneself, and *sponsio* is an older word to designate an obligation. Of the three forms of promise[370] known in Roman law – *sponsio*, *fridepromissio* and *fideiussio* – *sponsio* was the oldest. It was characterised by the expression "spondeo", after the question "idem dari spondes?". Words like "*sponsare*" that mean betroth and "*sponsi*" which means engaged share the same roots. Indeed, English words like spouse or sponsor etymologically derive from the word spons. Additionally, the prefix re- that specifies 'back to the original place again', reinforces the idea that responsibility is the quality to be able to make good on our promises. In any case, at least

[366] Theft by finding occurs when someone chances upon an object which seems lost or abandoned and takes possession without taking any steps to find out if the object is really abandoned or merely lost. See T Joycey, "finding of property" in P. Cane and J. Conaghan (eds) *The New Oxford Companion to Law* (2008)

[367] R.A. Duff *Answering for Crime. Responsibility and Liability in the Criminal Law* (2007) at p47

[368] J. Gardner "Relations of Responsibility" in R. Cruft, M.H. Kramer and M. Reif (eds) *Crime, Punishment and Responsibility. The Jurisprudence of Antony Duff* (2011) pp87,89

[369] N. Lacey The jurisprudence annual lecture 2013 *Institutionalizing Responsibility: Implications for Jurisprudence* 11. For a recent revision of principles and practices of criminal responsibility see N. Lacey *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (2016) Chapter 2.

[370] Forms of promise

etymologically, re-spons-ibility[371] denotes prospectiveness. The account of responsibility proposed here is related with this etymological concept. Law is concerned with establishing what our responsibilities are, telling us how to behave, guiding us and promoting interpersonal trust, more than it is about holding us to account for the way we have behaved. In this approach responsibility is the quality to accomplish the material functions contained in our status. Status determines the ambit of responsibility of the holder. Thus, a status holder is not to be understood as someone who can produce or prevent an event or incident, but rather one who can be responsible for it. Only when the event happens within the material domain of the status framework can the holder be held responsible. In consequence, we are only responsible for those events that happen within the framework of our status in the exercise of the assigned function. Attribution of criminal responsibility is not a historical verification of the existence of a naturalistic cause-effect link between a particular action and its result. Criminal responsibility can only be *attributed* to the status holder when he acts outside his *inactive* dimension, disturbing another holder's expectations, or in the performance of his *proactive* dimension, when he does not accomplish his status functions proficiently. As Cane correctly affirms, historic responsibility understood as the ability to respond, is the pathological form of legal responsibility.[372]

We are not responsible for any occurrence which is causally connected with us. In fact, we are usually responsible for a very limited amount of happenings in the relational world we live. The status-based concept of responsibility defended here deploys a filter to determine whether a specific action or behaviour has institutional significance or not. In the same way as society rewards those who efficiently perform their institutional functions, responsibility will be attributed when the institutional expectations allocated to our status have not been fulfilled. Attribution of responsibility requires then that the action or behaviour performed, aside from violating the institutional normative structure was within the *inactive* or *proactive* dimension of the status.

It was stated above that criminal law secures the institutional identity of the society against conduct that disregards the deontic model of guidance that the institutional structure defines. This institutional identity of human societies is secured as far as its

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[371] Curiously, "*respondere*" had a procedural use in Roman law as one of the three activities that Roman jurists performed, understood as the giving of an opinion on legal problems, usually ratified by a judge verdict known as "*response*"

[372] P. Cane *Responsibility in law and morality* (2002) at p35

members act within the framework of his status. An institutional reinstatement is not required when the event occurs outside the ambit of planning or action of the status holder because no institutional expectations have been fulfilled. If some harm results from an event causally linked with the status holder but outside his status framework, it should be attributed to other status holders or to a natural event or accident but not to the holder who acts according with his status. The social order or civility that criminal law contributes to preserve is not altered when the holder acts without generating a risk socially assumed in the performance of the functions assigned to the status. In the end, the harm of property or persons is criminally relevant only insofar as it undermines a deontic institutional structure.

Institutional responsibility reflects both dimensions illustrated above. The inactive dimension, grounded in the *neminem laede* principle, substantiates the first category of criminal responsibility and the first principle of civility. There exists the expectation that in the exercise of our individual orderly freedom we will make significant choices respecting others. As a counterpart, the status holder has to assume and respond for the consequences of a defective planning of his ambit of action. In this balance between individual orderly freedom and responsibility for the faulty consequences resides the first principle of civility: normative-institutionalised expectations and 'two-place trust structure' between strangers could not be secured without the attachment of responsibility to the free exercise of planning. Free will without institutional responsibility is pure randomness and incompatible with institutional order. We shall call those breaches where the status holder does not live up to the institutional expectations generated by the inactive dimension of status *offences of disassociation*.

But social order and civility is just the primary stage of an institutional order. Modern human societies are founded on active social interaction and cooperation. Vital structures in our contemporary societies like political participation, social cooperation, financial transactions, or business trading would not be possible without securing that their implementation is done professionally and competently. We buy shares in equity markets or ready-cooked meals in supermarkets expecting that those in charge follow the standards and procedures in place. The proactive dimension of status implies that in planning our lives interacting with others it is necessary to secure the proficient and orderly development of the essential institutions. Only in this way can the 'two-place trust structure' exist. The status holder has to guarantee the existence of the institution and its continuity, thus he will necessarily be made responsible for a deficient performance of its

institutional functions. We can therefore name those breaches where the status holder does not live up the institutional expectation grounded in the performance of the function attributed to his status *offences of association*. The relevance of *offences of dissociation* and *offences of association* will be crucial in the attribution of criminal responsibility in cases of false beliefs and its dissimilar relevance will be expanded on in Part II of the thesis.[373]

3.7 Knowledge of the law within the institutional framework

The legal moralist tradition does not contemplate human beings as able to take legal norms in their deliberating process as a consideration or reason for action. It is the fact that the citizen has done something wrong (whatever his deliberation process has been) that triggers criminal responsibility. If the wrongdoer can provide no justification for his wrongful action he will be held responsible. What is relevant is the extent of the moral wrong committed. In any case, knowledge of the law is irrelevant. On the other side of the spectrum, for *legal positivists*, knowledge of legal validity and its relevance in the practical reasoning before action is key. The law is not 'written in our hearts'. Any legal system must have cognoscible and knowable rules of action to guide conduct.[374]

Within the institutional framework here defended, knowledge not only of the law but of the institutional framework is essential. The institutional approach, recognising the relevance of deliberation, goes further in its range or extent. Not only do we consider legal norms in our practical reasoning but we also take into account that we count on the deliberation process of others. We expect that others will contemplate in their practical reasoning legal norms as a reason for action. We have the capacity to consider in our deliberation the fact that the deliberation of others is founded on expectations about what we will do. As a result we consolidate our plans based on the expectation of that responsiveness. In organising our lives, we normatively expect that others will take the institutional framework and criminal norms (if any) as a reason for action. With this expectation in mind we socially interact with unknown people in our two-dimensional status: active and inactive. To plan and organise our life over the expectations of others requires a deep knowledge of the social framework at an institutional user level. We need to know how the institutional framework operates, its content and limits, as well as any

[373] See Chapter 6.
[374] J.P. Shofield and J. Harris (eds) *The Collected Works of Jeremy Bentham. Legislator of the World: Writings on Codification, Law and Education* (1998)

potential exceptions or excusatory conditions. Only in this way we can interact with others without relying on groundless prospects.

But knowledge is essential as well in the attribution of criminal responsibility. Criminal responsibility will be directly attributed in those cases where the citizen notices and recognises that he is acting illegally. But in those situations where he is not, attribution of criminal responsibility could be challenging. The first issue to solve is the minimum threshold required to exclude any excusatory consequences of false beliefs. Whether this threshold has a moral, institutional, legal or criminal extension will be widely discussed in chapter 7. But beyond the establishment of a minimum threshold, knowledge is critical in the attribution of criminal responsibility. As deliberative agents we attain reasons from facts and grant them weight. Only true facts can be known, thus a false belief will be a deceptive consideration in our practical reasoning. For those reasons, cognitive capacities are essential in the attribution of criminal responsibility. It would be relevant to highlight at this point that cognitive conditions of criminal responsibility have been widely disregarded by legal philosophers. Scholars have been keener to discuss more appealing cognitive conditions like free choice, self-determination, and autonomy. Examining these conditions will precisely be the goal of the rest of this thesis. The research will undertake the task of providing a meaningful and operative solution for cognitive or epistemic conditions. This undertaking is readily apparent in those cases where the citizen *is* aware of the illicitness of his action but becomes more complex in situations where the result was not contemplated *ex-ante* by him. The solution would imply a revision of the practical reasoning mechanism of the acting citizen. As deliberative beings we have to notice and respond to legal reasons, like legal norms, in our deliberation. However, in particular situations, although our deliberation machine works properly, a citizen fails to notice (and consequently to respond) as expected, because he has a false belief. Several different variables will have to be taken into account to provide an algorithmic solution, and knowledge in our account of responsibility conditions is essential. In those situations where the cognitive position of the citizen does not trigger in his deliberation doubts or suspicions that his action could be criminal, the attribution of responsibility seems challenging. However, establishing a minimum standard of awareness is not an easy task either, and in any case, it should take into account the inactive and active dimensions of status. At least intuitively, it seems that some difference of standards should be introduced between the more specialised active dimension of the status and the more generalist inactive dimension. Either way, the

conclusion is that knowledge is critical in both the correct interaction in the institutional framework and in the attribution of criminal responsibility.

3.8 Conclusion

Each of the six main sections of this chapter has proposed a set of singular but interrelated concepts. The overall idea has been to provide a fresh conceptual framework for the criminal law, far apart from the moralistic/retributivist dominant scholarship. To avoid consolidated (and almost totemic) moral arguments, section 3.2 proceeded from the very beginning: the state of things as they really exist. Reality was then split between brute and institutional facts and this opening allowed the deployment of the almost illusory institutional dimension of the world we share. Modern societies would be unimaginable without institutional structures – a world grounded merely in expectations. Expectations that once reformulated and institutionalised receive an extra coat of legal protection. Determining the position of the whole institutional structure, interpersonal trust becomes its foundational stone. The fact that the trustworthy will be responsive to the fact that we are counting on them generates an expectation of responsiveness. In fact, beyond blame, disapproval, sanctions, fines or criminal punishment, our modern institutionalised societies work because we trust each other in order to achieve goals unreachable by ourselves.

In section 3.5 and 3.6 I hope to have done enough to introduce the reader to the practical consequences of the relationship between interpersonal trust and criminal law: the dichotomy between *offences of disassociation* and *offences of association*. Both sections introduced the concepts and made a sketch of the ambits of both categories. A deeper discussion is beyond the scope of this research. Interwoven in a coherent manner was the double dimension of status with the two and/or three place structure of trust, categorising the constellation of expectations related to any attribution of status that demarcates our ambits of responsibility. The relevance of both kinds of offences will be discussed later in Part II when an operative solution for false beliefs is introduced.

Finally, this chapter explained the relevance of knowledge of the law within an institutional framework. On one hand, knowledge is essential to interact with others in the use of an institution. We can only have reasonable expectations about the behaviour of others if we know the limits and extensions of the institutional framework we interact in. On the other hand, knowledge is critical in the attribution of criminal responsibility. As

deliberative agents we attribute criminal responsibility when we do not respond to legal reasons in our practical reasoning. But a potential lack of responsiveness could be the result of a false (factual or normative) belief. In situations where the citizen decides to act on a balance of reasons, but without notice of a particular relevant issue, it needs to be ascertained when the failure to know the truth will exculpate or inculpate the agent. An appraisal of responsibility seems incomplete without discussing the weight or significance that must be given to those mental conditions, such as what the citizen knew or believed, before action. But at the same time, as I have discussed chapters one to three, it is not an easy and uncontroversial task to achieve. The following chapter begins with the difficult task of developing an algorithm able to provide principled outcomes to cognitive conditions of responsibility.

CHAPTER 4

THE EPISTEMIC CONDITION ON CRIMINAL RESPONSIBILITY

4.1 Introduction

We are *social deliberative* creatures. The last chapter was mainly focussed on the social moment of deliberation: as rational thinkers we have the cognitive capacity to recognise that the deliberation of others will depend on expectations about what we ourselves will do. This chapter is predominately focussed on moments of fault in our practical reasoning and the consequences in terms of criminal responsibility. The introductory section 4.2 will criticise those retributivist approaches that challenge the idea that criminal norms could be reasons that inform our practical reasoning. For these thinkers, what is relevant is the final result of the action and, exceptionally, the existence of any justification to the behaviour. This research contends that what is significant is whether or not the agent took criminal norms as exclusionary reasons for action. Later it is asserted that to balance reasons properly the agent must be in optimal conditions of freedom and knowledge. Section 4.3 of this chapter will develop the argument that volitional and cognitive/epistemic conditions are essential to perform correct practical reasoning. As reason-responsive agents, in those situations where the deliberative mechanism is impaired by coercion, insanity or analogous situations, the agent's ability to be guided by reasons is diminished. Consequently, his potential responsibility is also mitigated. Likewise, in situations where the agent's deliberative mechanism works satisfactorily but he fails to notice and respond to legal reasons because he acts under a false (factual or normative) belief, a feasible exoneration could be contemplated.

Section 4.4 begins to flesh out the content of an algorithmic definition of an epistemic condition on criminal responsibility (ECCR); in other words, a test to

decide when an ignorant or unaware citizen will be held responsible for something he did or brought about. The first obvious stage of the test attributes full responsibility to the citizen who acts wittingly. The second stage opens the possibility to be equally responsible in cases where the citizen was unwitting of some features of the action but is nonetheless culpable for his ignorance. Sections 4.5 and 4.6 scrutinise two kinds of potential culpable ignorance situations: those cases where the current ignorance traces back to some previous culpable act; and non-tracing situations where the current ignorance must be attributed to its own merits. After ruling out both kinds of such cases, section 4.7 introduces a tailored deontic/normative proposal to delineate culpable ignorance. The citizen will be culpably ignorant when he was indifferent to the suspicion, raised by his latent knowledge, that his action could be criminal. Or, in cases where suspicions where not raised, there is the expectation that according with his standard of awareness as a status holder, their suspicions should have been raised, provided the citizen's capacity to seek additional information was not affected by physical or intellectual circumstances.

4.2 Introducing responsibility conditions

In a recent paper about excuses, Moore introduces a purported difference he observes in Aristotle's Nicomachean Ethics[375] between *cognitive* excuses such as ignorance or mistake, on the one hand, and *conative* (volitional) excuses such as duress, on the other.[376] However, this dual 'excusing condition' reading of Aristotle, without any reference to a theory of responsibility, could be misleading. It might be helpful to re-read the Nicomachean Ethics passage referred to by Moore to recognise that it is not written in an excusatory tone, but rather one of responsibility. In the text, Aristotle distinguishes between voluntary and involuntary passions and actions. Only voluntary actions receive blame or praise. Others (involuntary actions) receive pardon or pity. Finally, Aristotle clarifies that involuntary passions and actions could be performed under compulsion or through ignorance.

[375] Aristotle *Nicomachean Ethics* (350 BCE) Book III, Ch.1
[376] M. Moore "The can't/won't distinction and the nature of volitional excuses" *Northwestern University Legal Theory Workshop* (2013)

Even as an introduction about *volitional* excuses made by a devoted retributivist like Moore, the unfinished arguments presented above could be too shallow. A more genuine and accurate interpretation of the Nicomachean Ethics is proposed by Fisher and Ravizza reading Aristotle's thoughts in the tone of responsibility.[377] According to them, responsibility should be attributed only when the agent does not recognise or weigh his reasons for action properly. In order to properly balance reasons, the agent must satisfy *two necessary conditions*. The fist condition, named by Fisher and Ravizza as the 'cognitive condition', includes the idea that the agent is responsible only when, as well as intention, he has knowledge about those facts adjoining his action. The second condition, termed as 'freedom relative', stresses the idea that the agent is responsible only when he acts freely. Of course, any theory about responsibility should also accommodate excuses (exceptional situations). For that reason, ignorance (or mistake) and force or duress are usually recognised defences. But defences are simple exceptions that confirm the existence of the rule but not the other way around.

We can concede then that this topic is better presented in terms of conditions of responsibility, rather than exclusively in terms of excusing conditions (exceptions). The essential issue to elucidate is what is necessary for someone to be endorsed as (criminally) responsible. In other words, what conditions must be met by the agent in order to be responsible for any happening he brings about by his actions. Only once such conditions are met can those significant excusing conditions that undermine the attribution of responsibility, like force/duress/fear or ignorance, be accommodated. Thus, and in accordance with the Nicomachean Ethics, any theory about criminal responsibility must envisage two types of *conditions of responsibility*: the first condition relates to the will of the agent; the second relates to his knowledge. The cognitive condition states that an agent is responsible only when he knows the particular facts (brute and institutional) proximate to his action. The second, the conative condition, states that the agent is responsible only if he acts freely when he acts intentionally. As mentioned above, the cognitive condition relates to the excuse of ignorance where the conative condition relates to the volitional excuses cited by Moore; those where the agent acts under compulsion. Once this discrepancy is

[377] M. Fisher and M. Ravizza *Perspectives on MoralRresponsibility* (1993) at p8

clarified, we can entirely agree with the statement made by Moore that "moral philosophers and criminal law theorists […] have struggled to make sense of this second kind of excuse (conative). I shall continue that effort".[378] The criminal literature about volitional excusing conditions are indeed vast and exhaustive[379]. Free will and determinism have played a fundamental role in the academic discussions about criminal responsibility for decades. In contrast, cognitive/epistemic conditions have traditionally received very little attention by criminal scholars. Cognitive requirements have essentially been ignored from the criminal academic debate for decades.

Responsibility conditions in any case provide the structural framework for the justification of criminal law and punishment in our liberal societies. Traditionally, inquiries into criminal responsibility have been concerned with freedom, self-determination, autonomy, control or free choice. These lines of thought are supported in the principles of human capacity. The agent is criminally responsible because he 'chooses' to act (intentionally, knowingly, recklessly in the way he did (illegally). The principle of individual autonomy that summarises most of the above arguments, is frequently emphasised by legal theorists as a fundamental concept in the justification of criminal law and criminal liability:[380] agents should be respected as capable of choosing their acts and treated as responsible only for their own behaviour.

This recognition of the ability *'to do otherwise'* plays a relevant role both in the process of criminalisation and in the attribution of criminal responsibility: it is commonly defended among legal theorists that in our liberal societies freedom of choice must be fostered and supported. As citizens we have the right to decide autonomously how to live our lives, which faith to follow, which sexual habits we practise, or which hair colour we wear. The fact that this right of self-determination must be promoted and respected implies that any purported restraint by the criminal law on the ambit of freedom or individual interests must be strongly justified. On the other hand, this self-determination and control condition is equally at the essence of

[378] M. Moore "The Can't/Wan't Distinction and the Nature of Volitional Excuses" *Northwestern University Legal Theory Workshop* (2013) at p1
[379] See G. Sher *Who Knew? Responsibility without Awareness* (2009) at p4
[380] A. Ashworth *Principles of Criminal Law* (2009) at p23. See A.P. Simester and G. Sullivan *"Simester and Sullivan Criminal law, Theory and Doctrine"* (2013) at p7

criminal responsibility.[381] The capacity and fair opportunity to do otherwise is a recognised precondition of legitimate criminal responsibility and for that reason, those processes that diminish or exclude control or self-governance of the agent over his own actions mitigate criminal responsibility. It is this kind of freedom or controls that infants, insane or coerced agents do not possess and therefore justifies their discharge from their *a priori* criminal actions.

Recently, some writers on criminal responsibility have proposed alternative fields to rest criminal responsibility. These theorists, broadening the role of morality in criminal law, have revived the Aristotelian idea that criminal responsibility must be related to the moral character of the agent's display of behaviour.[382] They argue that criminal responsibility is supported in the judgment that the agent's behaviour is evidence of wrongful, wicked, dissolute or immoral character. This approach moves responsibility away from the illicit action or wrongful behaviour, instead directing the inquiry towards the character or virtue of the agent. In the more moderate model, character-responsibility defenders support that conviction of the agent manifests the kind of character that is worthy of moral criticism or indifference towards criminal law. This conception of the moral agent as *qua* agent in general, rather than in relation with the action performed, envisages the agent as a reasoning being responsible for his desires and beliefs and other emotional responses at the time they occurred. Desires and motivations must reflect his system of values as agent. Thus, what makes a response relevant in terms of responsibility is not what the agent voluntarily chose to do or the elements he has under his control, but rather that it reflects his own values *qua* agent.

As highlighted above, while proposals and discussions about criminal responsibility have been predominantly focused either on free choice, capacity or character,[383] *cognitive/epistemic conditions* of criminal responsibility have been neglected among criminal theorists. Although it would be very plausible intuitively to assume that, in some situations, a failure to know the truth or a false belief might exculpate the agent (whereas perhaps in other conditions it would inculpate him), the

[381] H.L.A. Hart *Punishment and Responsibility* (2008) at chapter 6
[382] See V. Tadros *Criminal Responsibility* (2005)
[383] N. Lacey *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (2016)

field has been theoretically disregarded. It seems challenging to theorise about criminal responsibility without discussing the weight or significance that must be given to those mental conditions, such as what the citizen knew or believed, before action. This is the aim of this chapter: to provide a *principled account of the cognitive/epistemic conditions on criminal responsibility*. In doing so, the research opens a fresh and novel account for ascertaining under which circumstances the agent was culpably ignorant about his illegal behaviour.

4.3 The deliberation process before action

I shall start by fleshing out my account of epistemic/cognitive condition of criminal responsibility, expanding the central argument proposed in the last chapter about the process of deliberation through which the agent reaches a decision to act in a particular way. The argument rests on the certainty that citizens are rational thinkers with the ability to conform their behaviour to reasons. This human feature of reason-responsiveness is the cornerstone of responsibility, the critical point to take into consideration to determine the extent citizens could be held responsible. It was suggested in the previous chapter that what is salient about *institutional structures* is the deontic framework they create. This framework provides members of the society with a reason to act in a particular way: i.e. the manner in which that particular society has collectively recognised to behave which, at the same time, also discloses what others can expect from our behaviour, prescribing and outlining our ambit of responsibility. Citizens are responsible for their actions only if it is reasonable to expect them to conform their behaviour to the appropriate institutional standard. This expectation can only be sustained if the agent has the capacity to behave accordingly as a result of implementing his rational conditions, that is to say, by way of a reasoning process.

Appropriate deliberation, according to Yaffe's arguments,[384] is a complicated process that depends first of all on whether or not the citizen: a) extracts the correct reasons from the facts she has under consideration; and b) considers properly the reasons distilled, granting them their precise weight. When the agent identifies from

[384] See G. Yaffe "Excusing mistakes of law" *Philosophers imprint* (2009) 9:2

the facts the correct reasons and also weights them properly, then if the citizen acts accordingly the action is acceptable and non-reproachable. *Contrario sensu,* an inaccurate recognition of reasons could lead to an unacceptable outcome that exposes the agent to disapproval and criticism, regardless if the weighting of reasons in the deliberative mechanism works well. To be responsible implies that the citizen fails to notice a fact as a reason or she fails to properly consider (weigh) the identified reasons in her deliberation process, not responding to (or refraining from) the legal reasons under consideration. As a result, we can establish, according to Yaffe, two different sources of momentum in the appraisal of liability: first, when the wrong action is the result of a deficient recognition of reasons from the facts; and secondly, when the wrong action is the result of a deficient allocation of weight to the reasons extracted. Consequently, the outcome of the deliberation can be perverted by the premises of reasoning considered or by the deliberation process itself.[385]

Deliberation is also a complex, psychological norm-governed process. It implies the formation and reconsideration, using inductive and deductive principles of reasoning, of beliefs in light of emerging evidence available to the citizen. When we deliberate we extract reasons from the facts that we confront and we grant them weight. Transposing these arguments to the legal arena, deliberation involves the recognition and weighting of legal reasons for action. We extract legal reasons from the facts we face and weigh these legal reasons in order to ascertain what we should do. Criminal responsibility arises only when the citizen fails to notice (recognise) or respond (refrain) to the exclusionary reasons for action provided by criminal norms (in contrast to moral ones).

However, in some circumstances the failure to notice does not trigger criminal responsibility straightaway. In some situations, the citizen cannot be held criminal responsible because: a) the *citizen's deliberative mechanism is impaired* in the moment of action – he cannot respond to reasons because his ability to respond and be guided by reasons is damaged or diminished (recognised examples are insanity, non-age and intoxication; or b) the agent's deliberative mechanism works properly but the *citizen fails to notice* (and consequently to respond) because he has a *false belief* or

[385] See G. Yaffe "Excusing mistakes of law" *Philosophers imprint* (2009) 9:2

acts ignorantly. This is the most significant argument of this research. As reason-responsive agents, in these situations where we fail to notice or refrain from acting on institutional/legal reasons because we act under a false belief, there is potential room for exoneration.

Finally, before moving on it is important to highlight that although in any deliberation process we might hold false beliefs, belief formation (false or true) is a passive matter not in the control of the agent's will.[386] This approach about beliefs, rejecting doxastic voluntarism or the philosophical view that we can control what we belief, is controversial[387] but assumed in this research. In order to act in a way consistent with the results of our explicit practical deliberations we need to operate with our actual representations and information.[388] Only the conscious information personally available to the agent can guide him; any other behaviour would amount to pure chance or accident. Thus, when we decide what to do (deliberate), only those representations and information that we are conscious of are available for rational consideration: we only deliberate about what we are aware of. Of course, unwitting reasons can also play a role in our deliberation process – they can shape the content of our reasons for action – however they cannot be the content of our reasons for

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[386] G. Rosen "Skepticism about Moral Responsibility" *Philosophical Perspectives* (2004) 18(1):302.

[387] See Pamela Hieronymi who argues against this assumption offering an account of responsibility compatible with the doxastic volitionist position that we can believe at will. She claims that beliefs have their own distinctive form of responsibility (answerability), different from responsibility for witting actions. When the agent acts intentionally he is responsible for reasons that he takes to show something good about so acting. However, in responsibility about beliefs the agent is responsible for the reasons he takes to show the belief to be true. See P. S. Hieronymi *Responsibility for believing* (2008) pp161-357. See also C. Ginet "Deciding to Believe" in *Knowledge, Truth, and Duty* (2001) pp63-76. See also, J. Montmarquet "The Voluntariness of Belief" *Analysis* (1986) 46:49-53.

[388] Neither beliefs nor false beliefs are voluntary, but we are liable for them. Responsibility for them is attributed because there is some sort of rational connection between what we observe and what we estimate to be significant or relevant when it reflects an objectionable evaluative attitude. In some failure-to-notice cases, the agent could also be responsible when he demonstrates an insufficient concern about the probability to injury or damage others. Scanlon, for example, affirms that the agent is responsible if "[…] she has governed herself in a way that would not be allowed by any principles that no one could reasonable reject". (T Scanlon. *What we owe to each other*, (Belknap Press 1998) at 268). This responsibility comes from a defective self-governance that includes two kinds of fault in the reasons the agent identifies: "First, and most obviously, if any principles that no one could reasonably reject would count certain considerations (the likelihood of harm to others, for example) as conclusive reason against a certain course of action, then a person acts wrongly when he or she decides to follow that course anyway, in full awareness of these considerations. But, second, a person also acts wrongly when he or she simply fails to take notice of considerations that these principles hold to be relevant (for example, fails to take note of the fact that his or her course of action involves a risk of serious harm to others) T. Scanlon *What we owe to each other* (1998) at 269

action.[389] Unconscious beliefs or attitudes shape our consciousness and may even affect a citizen's deliberation process, but we cannot reasonably expect them to guide their behaviour precisely because we are unaware of them. In our practical reasoning we only consider those features of the facts of which we are currently consciously aware. When we deliberate about what we should do, we weigh the strength of the reasons for and against the various alternative actions that are available to us. Deliberation, as a psychological practice, involves considering our conscious beliefs in a way that unaware beliefs are not. As deliberating citizens, it is only our conscious beliefs that provide us with feasible possibilities of action. Thus, perhaps we can only be fairly made responsible of those decisions that we were prospectively aware.

4.4 Two *psychological* momentum in the epistemic condition on criminal responsibility

If the above argument is correct and our beliefs are something that happens within us or to us, we could suggest that we are not straightforwardly responsible for our beliefs. On the contrary, what we can emphatically affirm is that we are responsible for that which we are aware of or is under our control. Reflecting on this categorical feature, we can formulate the first *psychological momentum* of the epistemic condition of criminal responsibility:

The citizen who performs a criminal act is criminally responsible when, satisfying other conditions for responsibility,[390] *he is aware that the action was illegal.*[391]

This straightforward psychological momentum of the epistemic condition is as uncontroversial as it is simple. It basically attributes responsibility to the citizen because the action was under his conscious control. The citizen's decision to act in the way he did reflects those reasons for action that constitute his will. As the act was under his voluntary control he was undeniably responsible for it. However, being obvious and apparent does not discharge this first momentum of legal significance in

[389] See N. Levy "The importance of awareness" *Australian Journal of Philosophy* (2013) 91:2 at 13
[390] Generally conative or volitional conditions
[391] Illegality at this stage includes illicit actions carried out while holding false beliefs about brute, normative or institutional facts

terms of responsibility; it emphasises the relevance that knowledge and will have on the attribution of criminal responsibility. The citizen who knowingly and willingly behaves criminally is responsible because he actually notices and recognises that he was acting illegally.

The first momentum proposed in the epistemic condition raises an obvious question: is the agent only responsible for what he is aware of doing? Certainly, this restrained first momentum of the account of responsibility excludes actions that at least we intuitively recognise as manifestly the responsibility of the agent. It excludes, essentially, those actions where the agent is not directly or indirectly in control of their action because he *fails to notice* that his act was illegal. The first moment of the epistemic condition disregards any responsibility for our false beliefs or ignorant actions when we intuitively acknowledge these as wrong. Building our account of the epistemic condition, we must incorporate under what circumstances the agent is also *responsible* for his ignorance or false beliefs.

At this point, it is appropriate to stress that for the sake of our argument, although the *failure to notice* can be the result of a false belief or plain ignorance, we treat both phenomena in the same way. False beliefs and ignorance are clearly two different psychological and philosophical phenomena. Ignorance involves a negative status where the agent completely lacks knowledge or representation about some fact. On the other hand, mistake implies a positive status: the mistaken agent has a false belief about some fact. For our purposes, we include both phenomena under the generic concept of ignorance, because what is relevant is that they affect the deliberation process in the same way. Then, as aforementioned, due to the undisputed but constricted first momentum proposed above, the epistemic condition must accommodate or include those cases where the agent acts *ignorantly*. To do so, the condition should clearly identify and categorise the potential dissimilarity between irreproachable ignorance and culpable ignorance. Furthermore, and being consistent with the intuitive suggestion offered above, the structure of the condition should provide a principled proposition that equalises culpable ignorance with conscious acts. Condensing the entire requirement discussed above, we can implement a second *psychological moment* in the epistemic condition of criminal responsibility:

The agent who performs a criminal act is criminally responsible when, satisfying other conditions for responsibility, he is either aware that the action was illegal or he was culpably ignorant about some feature of the criminal act.

Both momentums could easily be theoretically accepted as a basis for criminal responsibility. The theoretical dispute would obviously arise in defining the contours of blameless ignorance from culpable ignorance. The reason for the disagreement has a double dimension: first, the outcome will equalise (in responsibility terms) culpable ignorance with a conscious and knowingly illegal act; secondly, the agent who performs a criminal act on the basis of blameless or non-culpable ignorance does not comply with the requirements of the epistemic condition and subsequently he is not criminal responsible for the action.

4.5 Clarifying the epistemic condition: the alternative tracing thesis

Chapter 2 highlighted the reasons that the *moral legalism* approach, dominant in the criminal legal theory, has disregarded any potential necessity for an epistemic condition in an account of criminal responsibility. As a result, knowledge conditions have not received the examination and consideration they merit. In fact, as discussed in chapter 1, no proposal exists for an epistemic condition in the criminal literature. This lack of contextual theoretical debate can only be overcome by scrutinising and exploring how hypothetical alternatives might resolve the culpable or irreproachable ignorance puzzle. Thus, instead of starting by defending my own account of culpable ignorance, this chapter will suggest and discuss potential alternative frameworks for culpable ignorance. Only then can we uphold a (hypothetically) contextualised proposal for an epistemic condition of criminal responsibility. In order to delineate culpable ignorance, three feasible alternative views will be suggested for consideration and scrutiny. These three views share in common the argument that the agent acts illegally because he failed to notice *in the past* some important aspect of his prospective behaviour. From this perspective, a current ignorant act inherits its culpability from an earlier conscious choice of the agent. If the agent's false belief can be traced back to a prior action over which he was in control or he conscientiously did she is culpably ignorant.

4.5.1 The actio libera in causa alternative thesis

The first suggestion for culpable ignorance introduced here will be based on the *actio libera in causa* doctrine.[392] This doctrine applies to involuntary actions when performed (non-free in themselves) provided the citizen was responsible for causing the conditions of non-freedom (free in their causes). The doctrine includes cases where the evaluative judgement of the citizen is diminished in the moment of action, but the cause of this state can be attributed to him. The doctrine is especially appealing in cases where the citizen, impaired in the moment of action, demonstrates some kind of previous negligence or carelessness that directly causes his subsequent illegal actions. For example, consider the citizen that impermissibly takes his sleep-inducing prescriptions before then driving to the city centre where, upon falling asleep at the wheel as a result of the consumption, runs over and kills someone that otherwise he would have noticed. In cases like this, the conscious prior action (T1) leads the agent to cause harm unwittingly in the moment of action (T2). As a result, although the agent might not be criminally responsible for (T2) his responsibility is attributed to the previous (T1).

Our first version of tracing cases for culpable ignorance could provide then that ignorance is culpable if it can be traced to a prior conscious free act of the citizen. Nonetheless, in order to fine-tune the proposal, we should distinguish between those prior free acts in which the citizen intentionally creates the conditions from those cases in which the citizen generates the conditions under which she performed a criminal action involuntarily. We might differentiate those involuntary cases where the citizen was aware that their conscious action involved a foreseeable risk to later outcomes from those that do not involve such a risk. We could conclude that responsibility arises only in cases of foreseeable risk. Perhaps we can determine that responsibility can be attributed regardless of the potential anticipation of a feasible risk if the agent acts involuntarily. Such considerations go beyond our purposes in this section which only attempts to outline realistic alternatives to culpable ignorance. If my thoughts were consistent and convincing enough it follows that from the *actio*

[392] For an account of the doctrine see S. Dimock "Actio libera in causa" *Criminal law and Philosophy* (2013) 7(3):549-569

in libera causa doctrine (perhaps) a coherent and credible account of culpable ignorance could be achieved.

4.5.2 The akratic alternative thesis

The next proposed alternative of culpable ignorance rests on the doctrine of akrasia. According to this account, culpable ignorance would require a previous action for which the agent is evidently culpable because it was performed with the belief that it was wrong.[393] To assign criminal responsibility to an ignorant agent would imply, so states this approach, holding him responsible for his akratic actions.[394] According to this account, the agent's responsibility in T2 is the result of a chain of culpability traceable to an original behaviour T1 done without ignorance for which the agent is responsible. At that point, the continual search down the chain of culpability ends. Once this novel failure to notice is identified, its culpability transfers downstream to the current act T2. The problematic feature of this proposal is how to identify when an akratic action is in itself culpable because the action was performed with the belief that it was wrong. A viable option could be to demand from the agent (as a status-holder) to fulfil some kind of standard of prudent procedural epistemic obligation.[395] This epistemic obligation would be connected with both the *inactive* and the *proactive* dimensions as status-holder. The agent (status-holder) who has obligations to perform or to refrain for doing certain actions will fail to comply with his procedural epistemic obligations when he omits to do some required precaution to prevent the formation of these kinds of false beliefs. Such an approach does not involve being responsible for the false beliefs themselves, but rather for failing to guarantee that when he has to act or refrain from action, he will know which prudential steps he ought to be aware of.

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[393] For an account of akratic moral responsibility see N. Levy "Culpable Ignorance and Moral Responsibility: a Reply to Fitzpatrick" *Ethics* (2009) 119(4):729-741. See also. M. Zimmerman "Moral Responsibility and Ignorance" *Ethics* (1997) 107(3):410-426. H. Smith "Culpable ignorance" *The Philosophical Review* (1983) XCII(4):543-71. H. Smith "Varieties of Moral Worth and Moral Credit" *Ethics* (1991) 101:279-303. H. Smith "The 'Prospective View' of Obligation" *Journal of Ethics and Social Philosophy* (2011)

[394] The state of mind in which someone acts against his or her better judgement through weakness of will.

[395] See G. Rosen "Skepticism about Moral Responsibility" *Philosophical Perspectives* (2004) 18(1):301

4.5.3 The benighted alternative thesis

The final tracing thesis proposed suggests that an agent will be culpably ignorant if he has performed a prior benighted act.[396] In these cases, the cognitive position of the agent in the moment of action is impaired as a result of a previous culpable act. This earlier act could be a wrong assumption or conclusion that causes the agent to acquire wrong or untrue information. The agent could have attained the correct information, but he culpably fails to do so. The prior benighted act causes the agent to be dispossessed in the moment of action of the evidence that would have directed him from refraining from the unwitting act. The correct information is not then an available option to the agent at a later time. The unwitting act of the agent is then justified taking into account the agent's actual belief but he is culpable of performing the benighted act. Here again maybe we should consider, in order to strengthen the thesis, whether the unwitting act fell under a known or foreseeable risk of the agent or not. Take, for example, a farmer that declined or forgot to read the recommendation letters sent by the Department of Rural Affairs about identification and recording of livestock because he is too busy milking his cows. If later, in his deliberative process of making judgements he comes to hold false beliefs about the movement of livestock he could be held culpably ignorant. The attribution of responsibility arises from the previous benighted act of ignoring the warning letters. The farmer, in avoiding his professional duties (as status holder), can be held culpable. Another question is whether to demand from citizens a feasible awareness about the risk of performing the benighted act.

The appeal of this thesis resides in the fact that it emphasises the significance of previous knowledge, information or evidence where the agent can later infer the risk or purported illicitness of the conduct. Unobjectionable deliberation processes require actual and updated information. Before acting the agent always has some latent and essential knowledge from the evidence available to him. The capacity to notice or recognize future risks or potential illicitness depends on whether or not in

[396] See H. Smith "Culpable ignorance" *The Philosophical Review* (1983) XCII(4): 543-71. H. Smith "Varieties of moral worth and moral credit" *Ethics* (1991) 101:279-303. H. Smith "The 'Prospective View' of obligation" *Journal of Ethics and Social Philosophy* (2011)

the moment of deliberation the agent has access to up to date information. When the deficit of information is attributable to a benighted act, the ignorant agent's action is culpable. Latent and updatable knowledge is a salient feature in the epistemic condition in its own right and shall be considered later in this chapter. The agent confronting a particular situation always acknowledges some factual context about the world around him. This consciousness could be fractional, considering both legal and brute facts. This latent and updatable knowledge should trigger in the agent the doubt or suspicion, during his deliberation process, that his action requires first the expanding of his basis of knowledge or information. When the latent knowledge does not exist or is not enough to activate in the agent the suspicion that the action requires further investigation or additional information, the action is not in the ambit of responsibility of the agent.

4.5.4 Conclusions about the tracing theories

The attractiveness of the three suggested alternative theories resides in the association of culpable ignorance with a previous conscious choice of the agent that flows downstream to the current fact; in other words, it requires that the previous act must be *blameworthy*. In such cases the agent's current state of culpable ignorance stems from a prior, conscious choice, for which the agent is evidently responsible. All three accounts of culpable ignorance connect the ignorant agent with conscious choices adopted in the past. It is therefore implicit in all the alternatives that culpable ignorance requires some kind of choice or control by the agent. This control or choice restrains any attempt of attribution of responsibility for actions not under our conscious control. Regardless of how this control moment is traced backed up to an initial choice, the alternatives provide a guarantee that the agent will only be held responsible for actions under his conscious will. But in order to be blameworthy, some kind of foreseeability is also required. To categorise the ignorance as culpable, the citizen must be aware (even in a potential way) that his present behaviour could lead to a later criminal act done in ignorance. This feature maybe affects the practical outcomes of the proposed alternatives. The agent would probably be responsible for too little if some foreseeability is mandatory.

As a result, the conceptual formulation of our epistemic condition demands us to widen the window of responsibility to include outcomes of actions not consciously chosen. Further, accounts of responsibility outlined by the tracing thesis fail because by attributing culpable ignorance to an earlier act, they disregard the evaluative attitudes or mental state of the agent in the moment of deliberation. The gist of culpable ignorance is transferred to the *libera in causa*, akratic or benighted act. This methodology disregards the mental state of the agent in the actual moment of deliberation. This could be an appropriate way of appraising the responsibility of agents whose mental conditions are impaired in the moment of action if the actual mental deficiency is the result of a previous action. It could also be a sensible way to attribute responsibility for actions which are not free in themselves, but free in their causes, provided the agent was responsible for causing the conditions of non-freedom, as in cases where the earlier *actio libera in causa* was the ingestion of alcohol or drugs. In these situations, although the evaluative judgement of the agent is diminished in the moment of action, the cause of his state can be attributed to him (or a third part). The conscious former action leads him to act unwittingly and to cause harm. Being mentally impaired at the moment of deliberation and having his evaluative judgement diminished could imply the consideration of an excusatory condition in the appraisal of the agent's act. Unless we can connect his actual mental state with a previous act under his control, the agent should be relieved of criminal responsibility.

In those specific cases of diminished mental states in the moment of action attributable to a previous conscious action, the tracing thesis could provide a controversial but feasible alternative. However, when the actual mental state of the agent in the deliberation process is normal, the tracing thesis fails to deliver a correct alternative. In those situations of mental normality, the situation of ignorance must be related or reflect the satisfactory rational evaluative judgement of the agent in the moment of action. Agential activity, understood as the constellation of evaluations and judgements concerning what attitudes or actions to perform, must have a role in the attribution of responsibility. Perhaps as a working exploratory hypothesis, it could be sustained that ignorance is only culpable when it stems from this rational evaluative judgement of the agent in the deliberation process.

4.6 Clarifying the epistemic condition: Non-tracing thesis

The alternative to the tracing thesis attaches the current state of ignorance not up to an earlier choice, but to the defective evaluative judgements of the citizen in the moment of performing the illegal action. From this second perspective the citizen is culpably ignorant in their own right at the moment of action. If correct and persuasive, the outcome of this second perspective would deliver an account of culpable ignorance that reflects the identity of the agent as a practical agent. As a result, the agent would be culpable for his ignorance on its own right and not as the result of a previous choice or an earlier conscious act under the agent's control.

This account of responsibility has been consistently defended by Scanlon who argues that an agent is responsible for those actions that reflect his judgements about what he has reasons to do (or believe). Scanlon calls this sense of responsibility "*responsibility as attributability"*[397] and requires that the attitudes that make the agent responsible can in fact be attributed to him as "his".[398] Responsibility in these terms does not require the agent choosing to hold or avoiding those attitudes. Substantive responsibility can be attributed if the person had adequate opportunity to avoid the particular and actual situation under appraisal. On this account, ignorance is culpable if it reflects an objectionable and reprehensible attitude in the moment of deliberation. It cannot be endorsed if the agent was brainwashed or sleepwalking but will be if the failure to notice was the result of indifference or conscious legal blindness. This failure does not need to be the result of a conscious earlier choice but rather due to faulty self-governance.[399]

Starting from Scanlon's concept of "judgment-sensitive attitudes"[400] we can construct an 'attributionist' alternative thesis to culpable ignorance. Our beliefs and other attitudes are not always under voluntary control,[401] but instead may be

[397] T. Scanlon *What we Owe to Each Other* (1998) at p249
[398] T. Scanlon *Moral Dimensions* (2008) at p202
[399] T. Scanlon *What we Owe to Each Other* (1998) at p269
[400] Ibd at p21
[401] M. Smith "Control Responsibility and Moral Assessment" *Philosophical Studies: An international Journal for Philosophy in the Analitical Tradition* (2008) 138(3):369-370

"unbidden without conscious choice or decision".[402] Nevertheless, as far as they are "up to us"[403] they reflect our rational judgement irrespective of whether they are our own conscious election. The agent qua rational agent is responsible to acknowledge the judgements implicit in their reaction to the world around them.[404] Ignorance inculpates criminally, according with this attributionist thesis, because the agent fails to take notice of considerations that no one could reasonably reject.

Take, for example, a farmer that declines or forgets to read the recommendation letters sent by Department of Rural Affairs (DEFRA) about new regulations for the identification and recording of livestock because he is too busy milking his cows. If, later, in his deliberative process of making a judgement he comes to hold false beliefs about the movement of livestock he would be held culpably ignorant. The attribution of responsibility does not arise from a previous benighted act or *actio libera in causa* to ignore recommendation letters. His false current beliefs are the outcome of two evaluative judgements: first, from his evaluative attitude that to milk cows was a more efficient management of time than spending his time reading confusing and demanding letters from the Department for Environment, Food & Rural Affairs (DEFRA); and second, his actual false belief about the movement of unrecorded livestock (if this is the case), reflects his judgement that the actual knowledge he had validated his belief that movement of unrecorded livestock is legally correct. The farmer's false beliefs are then the result of both evaluative judgements - his indolence towards reading about the new regulations and what he has to do later, evaluating the information and evidence available to him. These false beliefs or ignorance, following the attributive thesis proposed, are within the responsibility of the farmer or, in Scanlon's terms, he is culpably ignorant because he fails to notice or disallow considerations that stem from principles that any farmer (status-holder) should reasonably reject or ignore. In any case, the ignorance is culpable.

The problem with the outcome of an alternative attributionist thesis is that another careful and meticulous farmer who, despite his commitment to reading

[402] T. Scanlon *What We Owe to Each Other* (1998) at p22
[403] Ibd at p22
[404] M. Smith "Responsibility for Attitudes: Activity and Passivity in Mental Life" *Ethics* (2005) 115(2): 256

DEFRA letters, fails to notice the accurate information provided, will have an objectionable outcome and his evaluative judgement will be equally legally wrong. At least intuitively, it seems sensible to assume that any thesis about non-culpable ignorance must differentiate between the diligent and the inattentive farmer. In fact, an attributionist approach would render no one responsible for what he did. If the agent is responsible only for those attitudes and actions that reflects evaluative judgements about reasons, those agents that form judgements about whimsical or unusual reasons cannot be qualified as responsible. Think, for example, of the patriotic British farmer who believes that DEFRA's introduction of European Regulations should be ignored. His conscious repudiation of DEFRA is a reason for him to ignore their letters and norms.

A potential way to overcome this weakness could be the attributionist thesis' incorporation of the recognised distinction introduced by Dancy between normative and motivating reasons. Perhaps the reasons the farmer had for acting as he did (motivating reasons) can be distinguished from whether there was a good reason to act in that way (normative reasons). This distinction may provide a line of inquiry to surpass the pointed weakness. Thus, only the farmer who acts for good reasons can be excused of his current ignorance. The exploration of this or other possible solutions again goes beyond present purposes. The evident result is that a thesis for culpable ignorance that only considers the agent's judgement about his reasons fails, as the tracing thesis did, because of minimalism and simplicity.

4.7 The deontic moment of the epistemic consideration

The scrutiny of the different psychological alternative theses revealed their inability to provide an account of culpable ignorance that lives up the ascription of criminal responsibility that we intuitively expect. The inadequate outcome provided by a psychological momentum requires us to consider the insertion of a *deontic/normative* requirement in the epistemic consideration. The agent is not only criminally responsible when he *is* aware of the illicitness of his action, but also when he *should be* aware. The incorporation of the deontic momentum *should* introduce many new unknowns that the psychological momentum does not need to address. Our proposal of culpable ignorance will attempt to create three requirements that can

distinguish culpable ignorance from irreproachable ignorance: the latent and updatable knowledge of the agent; whether his failure to notice fell below the standard expected as status holder; and finally his physical and intellectual capacities.

The citizen who performs a criminal act is responsible when, satisfying other conditions for responsibility, he is either aware that the action was criminal or he was culpably ignorant about some feature of the criminal act when he should have noticed it, considering:

a) The latent and updatable information available to him;

b) The standard of awareness expected as status holder;

c) That internal or external circumstances do not diminish those individual intellectual and physical capacities required to notice the illicitness.

The rest of this section will flesh out the factors that model the deontic 'should' introduced:

a) The latent and updatable information available to the deliberative agent

Any citizen confronting a particular situation always acknowledges some factual context about the world around him. This consciousness could be hazy and fractional about both legal and brute facts, but it is still present. This latent and updatable knowledge should trigger in the agent the doubt or suspicion, during his deliberation process, that his action requires first expanding his knowledge of or information on the situation. When the latent knowledge does not exist or is not enough to arouse suspicion in the agent that the action requires further investigation or additional information, the action is not in the ambit of responsibility of the agent. This latent knowledge affects both dimensions of the status holder: active and inactive although, as will be discussed in Part II, latent and updatable knowledge plays a different role in offences of association and offences of disassociation.

Every time we interact with others (or the environment) we are aware of our surroundings. This ability to properly evaluate our context is essential for our adaptive success as a species. We identify the realities around us and we compare with our

memories in order to decide whether or not they are reliable or a source of risk, for example. Notice however that as Stark pointed out "a person cannot be said to be aware of a specific risk attendant upon a particular token of –ing without believing that that specific risk exist[405]. Using these previous memories and knowledge we can project or foresee how a particular new input can perform and accommodate our behaviour in a way to better achieve our objectives. Without memories or previously stored knowledge it is impossible to successfully interact with the world around us. Before any action this basic knowledge is updated with new inputs during the perception process. We process all this information in our deliberation before deciding to act, or how to act, or to abort an imminent action. Thus, it is specifically this latent and updatable knowledge that actually triggers doubt or suspicion in the agent that his action requires increasing their basic knowledge further.

In terms of awareness of risk, latent and updatable knowledge, also referred to as "passive knowledge"[406], "experimental knowledge"[407] or "latent knowledge" [408] has commonly been contrasted by authors to "actual" knowledge[409]. In Duff's terminology, for example, latent knowledge of a risk implies the general knowledge that a citizen has that can be transferred or called upon to ascertain whether a specific risk exists (or not) in relation to a particular action. Latent knowledge, in Duff's account, is present in a citizen's memory whether he is making use of it or not. For example, a citizen who knows how to play chess has a latent knowledge about chess' rules regardless of the fact that he is not using that knowledge when swimming. When this latent knowledge is called upon, this knowledge becomes "actual".

The concept proposed of latent and updatable knowledge in this research has a more dispositional substance[410] than the "latent knowledge" proposed by

[405] At p93
[406] See V. Tadros *Criminal Responsibility* (2005) at p257
[407] E. Colvin "Recklessness and Criminal Negligence" *University of Toronto Law Journal* (1982) 32:345 at p361
[408] R.A. Duff "*Caldwell and Lawrance* the Retreat from Subjectivism"(1983) *Oxford Journal of Legal Studies* 77, at 80
[409] See A. Duff, *"Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law"* (1990) at pp159-160
[410] See S. Garvey "What is Wrong with Involuntary Manslaughter" *Texas Law Review* (2006-2007) 85:333 at 344

Duff. It is more in line with what Duff defines in earlier papers as "tacit knowledge"[411]. It refers to the "coherence of the agent's behaviour [...] with manifestations of a relevant dispositional stereotype"[412]. The proposed latent and updatable knowledge here directly connects with the second requirement of the ECCR: *"the standard of awareness expected as status holder"* from the citizen. Latent and updatable knowledge in this context relates to the expectations of coherence of the citizen according to his stereotyped status. The citizen holds the sufficient latent and updatable knowledge required to trigger doubts or suspicions that his action is criminal if a relevant number of epistemic dispositions in his actions in accordance with his status have been previously manifested.

If this is correct, the citizen must reflect on his action or seek additional information before action or, alternatively, abort his planned action altogether. The ECCR emphasises the relevance of this updatable knowledge to determine whether or not the agent is *culpably ignorant*. The agent must use his abilities to ascertain the truth. If the agent, ignoring or disregarding his doubts, persists on performing the action, his conduct will be inexcusable. When the latent knowledge of the agent, updated with new stimuli, casts doubts or raises suspicions about his beliefs, he must stop the action in course altogether and further scrutinise the situation. What is relevant, in terms of excusatory consequences, are the epistemic/cognitive circumstances of the citizen. This additional knowledge is not incriminatory by itself, but present knowledge should be enough to prompt (during the perception process of recognition of a target, for example) the citizen to update his initial knowledge or abandon the action altogether. If the citizen persists on carrying out the on-going action he could be declared culpably ignorant, if, according with his latent knowledge, he could have inferred doubts that revealed the need to expand his initial knowledge.

Special considerations are required in those cases known as "wilful blindness", where the citizen chooses not to investigate or seek further

[411] A. Duff "*Caldwell and Lawrance* the Retreat from Subjectivism" *Oxford Journal of Legal Studies* (1983) 77 at 88
[412] F. Stark *Culpable Carelessneww* (2016) at p114

information in cases where a properly motivated citizen would[413]. Some authors, like Moore, have asserted that these cases should be treated as *equivalent* to recklessness[414]. Others, like Galligan[415], claim that wilfully blind agents act within the standard boundaries of recklessness. Recently, Stark has countered that these cases should be distinguished from recklessness[416] and categorized as a kind of negligent behaviour. The case R v Parker[417] provides a good example of how controversial the current solution for false beliefs, founded in the *mens rea* element, is in this topic. In this case, the accused, after failing to place a telephone call in an outdoor payphone, slammed the plastic handset onto the telephone, causing damage to the latter. On appeal, the appellant argued that he had not contemplated the risk of damage to the telephone. He argues that his failure to contemplate the risk of damage prevented him from being found responsible under the recklessness head of s 1 of the Criminal Damage Act 1971. The Court of Appeal, modifying the *Cunningham* concept of recklessness[418] (which solely requires foreseeability of the harm that occurred) held that the test for recklessness should also include "closing one's eyes" to an obvious risk[419] and consequentially the appellant should be considered reckless. Stark challenged the Court of Appeal's decision arguing that it is difficult to defend, as the Court of Appeal did, for the reason that when the infuriated *Parker* raised the telephone handset he "decided to put a belief out of his contemplation"[420]. It should be more realistic to conclude that *Parker's* fury prevented him from forming the correct belief about the risk linked to his action. Stark claims that the gist of this case should be whether or not we can have expected *Parker* to have done more to form a correct belief. Accordingly, he sustains that Parker is not a case of

[413] see D. Lanham "Willful Blindness and the Criminal Law" *Criminal Law Journal* (1985) 9:261 at p267. R.M. Perkings "Knowledge as a Mens Rea Requirement" *Hastings Law Journal* (1977-1978) 29:953 at pp962-63. D.N. Husak and C.A. Callender "Willful Ignorance , Knowledge and the 'Equal Culpability' Thesis : A Study of the Deeper Significance of the principle of legality" *Wisconsin Law Review* (1994) 29 at p54

[414] See M. Moore and H. Hurd "The Culpability of Negligence" in R. Cruft, M. Kramer and M. R. Reiff (eds) *Crime, Punishment and Responsibility: the Jurisprudence of Antony Duff* (2011) at p311

[415] D J Galligan "Responsibility for Recklessness" *Current Legal Problems* (1978) 31:55 at 68

[416] F. Stark *Culpable Carelessness, Recklessness and Negligence in the Criminal Law* (2016) at p243

[417] (1977) 1WLR 600

[418] R v Cunningham [1957] 2 QB 396

[419] "…a man certainly cannot escape the consequences of his action in this particular set of circumstances by saying 'I never directed my mind to the obvious consequences because I was in a self-induced state of temper' R v Parker at 604.

[420] F. Stark *Culpable Carelessness, Recklessness and Negligence in the Criminal Law* (2016) at p243

wilful blindness or its equivalence with recklessness, as defended by Galligan, but a clear case of negligence[421]. In any case, this research does not attempt to engage in disputes about a potential elasticity of the *mens rea* element[422], in particular: a) whether or not recklessness should include those situations where the accused "closes his mind" to a particular risk; b) whether or not wilful blindness cases are equivalent to recklessness; c) whether or not it is inappropriate to state that *Parker's* action, of raising the telephone handset, implies a decision to put a belief out of his contemplation, as Stark states[423]; d) whether or not *Parker* is a good example of negligence instead recklessness or its equivalence to wilful blindness. For this reason, this research proposes that false beliefs would be better analysed in terms of the epistemic conditions of the citizen rather than through notions of *mens rea.*

In conclusion, in those situations where the citizen shows indifference towards the task of updating his latent knowledge or, in any case, from stopping the on-going action altogether, he will be culpably ignorant. At the same time, a direct and relevant conclusion from this initial assumption is that in those situations where current knowledge was insufficient to trigger the need to search for additional information, the agent should be excused. This is the reason the ECCR introduces a second *correction factor*, the required standard of awareness as a status holder, to restore the potential unfairness that this first requirement could raise. This second requirement would determine when a citizen, whose doubts were not triggered during his perception process, can still be held culpably ignorant.

b) The standard of awareness expected as status holder

The first prerequisite of the ECCR raises a problem of fairness concerning the standard of awareness. This requirement would imply that the action of indolent citizens who have done nothing to ascertain the truth would be non-reproachable. This solution would bring about an unfair outcome in those cases where citizens have

[421] F. Stark *Culpable Carelessness, Recklessness and Negligence in the Criminal Law* (2016) at p243
[422] See chapter 5.2 of this thesis
[423] See F. Stark *Culpable Carelessness, Recklessness and Negligence in the Criminal Law* (2016) at p243

made an adequate effort to ascertain the truth, but for some reason fall short. More importantly, a pure psychological approach would jeopardise the main aim of the criminal law: fostering interpersonal trust. If the validity of an institutional structure only depends on others users' perception, our expectations would be vulnerable to them. Thus, if a normative model of orientation is essential for the effortless and frictionless interaction between strangers in an atmosphere of mutual trust, a normative corrector factor should be introduced in the ECCR.

The suggestion here defended proposes that in order to secure the institutional identity of the society, the correction factor should rely on the status holder's perspective. As aforementioned above, status[424] is a salient concept in the institutional structure because its deontic framework guides both the institution's user and those who interact with him. Our institutional concept of status rests on the fact that within our modern heterogeneous societies social institutions shape our ambit and extension of freedom. We learn the way in which institutional realities present in our societies function before we interact with others. Trustworthy social interaction can only take place within the deontic framework created by this function status.

It was explained earlier[425] that trust could be created in a binary or ternary trust-structure. The former is concerned with *trusting in anyone* whereas the latter refers to trusting *someone to do something.* Interweaving both trust-structures with responsibility, the status holder needs to configure their ambit of action both negatively and positively. Negatively, he is responsible for configuring his ambit of action, avoiding causal processes that jeopardise the planning of others or the natural environment (*neminem laede* principle); positively, the status holder is responsible for a deficient performance when interacting with others within the institutional structure.[426] Here, the institutional expectation is not the creation of non-permitted risks but that the function status will be performed competently and proficiently. These two demarcations were categorised previously as an *inactive* and *proactive* dimension of status.[427] Finally, connected with this double dimension, a new

[424] Status would be constructed as the constellation of expectations related to a particular position. See chapter 2 for a more detail exposition
[425] See chapter 3
[426] See chapter 3
[427] See chapter 3

classification of offences was proposed: *offences of disassociation* were defined as those where the status holder does not live up to the institutional expectations generated by the *inactive* dimension of status. However, modern societies are also founded on active social interaction and cooperation. Criminal law, securing interpersonal trust, is not only concerned with the assurance of ambits of respect but also guarantees that cooperative institutional functions will be performed efficiently. The *proactive* dimension of status implies that planning our lives and interacting with others is necessary to secure the proficient and orderly development of the essential institutions. *Offences of association* bring together those criminal actions where the status holder does not live up to the institutional expectations generated by the active dimension of status.

As a result, it sounds reasonable to require that the *corrector factor* should reflect this dual perspective in those cases where new inputs did not produce in the agent suspicions about his potential false beliefs. The active and inactive dimensions of status require a different level of social interaction, thus the standard of knowledge required should be different in both kinds of offences. Hence, instead of supporting a single corrector factor, the proposal defended in this research will suggest a binary-appraisal methodology: for offences of disassociation the evaluation will be based on the '*collateral institutional user test*', where for offences of association this paper defends what Gardner calls a "*specialized standard*",[428] in particular a version of the *Bolam test*.[429]

The inactive dimension supports the first category of criminal responsibility and the first principle of trust. Institutional users have the expectation that in the exercise of planning our lives we will take significant choices affecting others. The first obvious comparative standard available would be the "*reasonable person*". But as Gardner highlighted, "[…] the services of the reasonable person are in such heavy demand in the law, I will suggest, precisely because he sets extra-legal standards, and indeed extra-legal standards of a notably versatile kind."[430] Accordingly, it sounds

[428] J. Gardner "The Many Faces of the Reasonable Person" *LQR* (2015) 131:1 at 25

[429] The case of *Bolam v Friend Hospital Management Committee* established the typical rules for assessing the appropriate standard of reasonable care and negligence in relation to skilled professionals.

[430] J. Gardner 'The Many Faces of the Reasonable Person' *LQR* (2015) 131:1 at 3

more adequate then to implement a comparative standard that reflects particularly the set of expectations that an individual user of the institutional framework would have: a *collateral institutional user test*. This evaluation demands a more limited circumscription of knowledge than that usually required of the 'reasonable juror'. Applying the test, judges or juries must restrict their assessment to the institutional framework where users are interacting investing themselves as institutional users. From this perspective, they should decide whether or not the accused has lived up to reciprocal institutional expectations in the particular case in front of them. Therefore, if new inputs do not trigger doubts in the agent about his beliefs what needs to be decided is whether the behaviour of the agent falls below the standard of the ordinary user in his situation or not. Where in the first ECCR's requirement the appraisal was absolutely psychological, in this second requirement outlined a normative standard is used. In short, if the behaviour of an ordinary institutional user with similar knowledge and under similar circumstances to the defendant would have had the same (false) belief, the accused will be acquitted.

Active social interaction has always been vital in human societies. This has become even more so in our globalised modern society. Fundamental configurations at the heart of our societies like political participation, social cooperation, financial transactions, or business trading would not be conceivable without securement that its implementation will be done competently. In a current world where, for example, more peer-to-peer platforms, like Ebay, Airbnb, and even crypto-currencies are popular, to trust unknown people is key. The proactive dimension of status requires securing the proficient and competent development of essential tasks, but also to know institutional frameworks. We need to trust the architect who designs our houses or bridges as much as they need to trust their dentist. The reasons for this ternary trust-structure were explained above in terms of efficiency. We cannot do everything on our own so we need to trust others in a particular domain so that we can focus on the things that are really important to us. We cannot waste our time technically assessing the structure of our buildings every time we use them. We need to trust the architects, builders, plumbers, etc. who construct the building. Only in this way can modern specialised societies thrive. Institutional users within that specific institution would be made responsible for a deficient performance of their institutional functions. Acting in the proactive dimension of status requires more skills and abilities than the

average institutional user; it thus follows that in cases of *offences of association* the test should be stricter than the *collateral institutional user* test. The test applicable should therefore be in line with the standards required for a competent, skilful and proficient user of that particular institutional structure. But our opinion on what a competent and practiced use of the institutional structure is can differ from status holder to status holder. To solve this alternative standard I propose a solution in accordance with the function of the criminal law of endorsing trust. It should be enough to show that the decision taken protects users' expectations regardless of the opinion of other users that could differ about the choice. As far as the expectations about the institutional structure are protected the choice should be admitted as adequate.

c) Internal and external circumstances that diminish the capacity required for noticing the illicitness

Finally, circumstances related to personal capacities could exclude a citizen from responsibility. The third requirement of the ECCR states that the intellectual or physical capacity of the agent at the precise moment the action occurs could compromise or diminish the process of perception. In those circumstances where the citizen fails to form the appropriate belief during his process of deliberation as a result of his lack of intellectual capacities, he cannot be held responsible.

These conditions could alter the perception process of the agent affecting his judgement about the need to seek additional information or abort the on-going action altogether. Objective alterations like light reflecting or flashing, or external sounds for example, could affect the intellectual or physical epistemic capacities of the agent. Additionally, the personal conditions of the agent can also affect his responsiveness to the reality that surrounds him. Visual misperceptions, seizures or even migraines can affect the perception of reality. Diplopia (double vision), colour-blindness, hearing voices, drug-induced hallucinations, and even some types of medication can influence the agent's perceived need to search for more information related to brute facts. In those situations where the perception process exposes doubts about his beliefs and the

accused fails to expand his initial knowledge and continues with the wrongful action he will be criminally responsible unless intellectual or external circumstances have distorted his perception process. This is the current position sustained by courts in cases of awareness about a risk (recklessness) when the accused was not of sound mind or lacked the capacity to think, reason and understand for himself. This was, for example, the approach of the Court of Appeal in R v Stephenson[431]. In this case, the appellant started a fire in a hollow he made in a haystack. The fire then spread and caused damages to the amount of £3500. The appellant was convicted under section 1 of the Criminal Damage Act 1971. However, on appeal the court held that the recklessness test is subjective. Accordingly, although for a person of sound mind the risk of causing damage would be obvious under the circumstances, the fact that the appellant had a history of Schizophrenia prevented him from forming the correct belief about the risk of causing damage.

4.8 Conclusion

No final judgment about the guiltiness of an accused can be properly delivered without appraising his epistemic condition. It should be extensively accepted that the most difficult cases of attribution of responsibility are precisely those where the citizen unwittingly does something criminal. This chapter has attempted to provide an algorithmic solution for these unwitting situations. The main argument is that citizen's responsibility for any unknowing conduct is related to the culpability for his own ignorance. A coherent framework, aside from tracing/non-tracing cases, has also been provided to establish culpable ignorance. The lack of consideration from legal scholars about cognitive conditions has allowed me to freely suggest an *a priori* workable but *sui generis* principled solution. The proposal attempts to also be consistent with the institutional conceptual framework defended in previous chapters. This coherence will be maintained in the following chapters where the ECCR will be put in practice across an innovative institutional classification of false beliefs beyond the error of law/fact current solution. Applying the ECCR to this new proposed set of false beliefs will be its acid test. In any case, the constraint of working within the

[431] (1979) QB 695

limits of the institutional framework previously proposed could also provide guidance in those specific cases where the ECCR would be short of resources.

PART II

In part I, after an extensive review of the fragmented and patchy theoretical framework surrounding false beliefs (chapter 1), this research discussed the reasons why a principled solution has been so evasive and problematic to achieve (chapter 2). To do so, the thesis scrutinised the dissimilar approaches taken towards the function of the criminal law by the *legal moralist* and *legal positivist* schools of thought. As an alternative (chapter 3) we proposed a more sociological orientated framework that implements an institutional approach to the legal phenomena. The legitimation of criminal law in this picture is defined as the guarantor that secures the institutional identity of society against conduct that contravenes the general normative model of orientation or guidance in social interactions that the institutional structure defines. The maintenance of institutional expectations legitimates the use of punishment as a means to guarantee the validity of the institutional normative framework. Only within this framework of reciprocal institutionalised expectations can we interact, cooperate and essentially *trust* others.

What is salient about institutional structures is the deontic framework they create. This framework provides members of society with a reason to act in a particular way – the manner this particular society has collectively recognised to behave – but at the same time it discloses what others can expect from our behaviour, prescribing and outlining our ambit of responsibility. This expectation can only be sustained if the agent has the capacity to behave accordingly as a result of implementing his rational conditions; that is to say, by way of a deliberation process. Finally, Chapter 4 addressed the relevance of cognitive conditions in the deliberation process as highlighted in chapter 3, introducing the Epistemic Condition of Criminal Responsibility (ECCR). Giving continuity to the arguments defended in the previous part I, this second part of the thesis will attempt to categorise, systematically and analytically, the cognitive condition, placing the ECCR in practice.

It was claimed in the previous chapter that the ECCR is an algorithmic, principled way to deliver a coherent and consistent solution for any kind of false belief. This position does not negate, however, a potential categorisation of false beliefs. Ontological structural differences between beliefs should also be taken into consideration in a systematic study of the topic. The defence of the ECCR does not imply that all false beliefs must be resolved identically. In contrast, some kind of

categorisation is not only convenient but also necessary. Appropriately classifying beliefs is essential because it enables the ECCR to supply customised practical and principled outcomes. That said, it is relevant to say that this categorisation must reflect the authentic qualities of the beliefs under consideration and not only functional or consequential criteria. Thus, the key point again is to determine a suitable *differentiator*. Only a categorisation performed from this premise will deliver a reliable and genuine one.

The traditional and commonly accepted *differentiator* rests on a purported normative/factual dichotomy of false beliefs. The customary way to deal with the excusatory effects of false beliefs has been through the classical binary distinction between error of fact and error of law, the latter being amended by the "error of civil law" heading.[432] This classification is simply inadequate and deficient. Categorising is a process where objects and ideas are recognised and differentiated based on their similar properties. This, in fact, is the success behind categorisation in natural sciences: categorisation makes the cognition of the world around us easier. The first problem with such a binary classification resides in the fact that it is sometimes difficult to ascertain whether the false belief is about a factual or a legal issue (see, for example, sexual consent). This is the argument held by Alexander who, in a debate with Husak on this issue, points out that the distinction would be arbitrary: "…because all legal prohibitions consist of facts–such as, that this legislative body passed this law that contains these words that have this intended meaning—and that because all mistakes of fact are also mistakes about whether the law prohibits a particular token of conduct, all mistakes of law could be looked at as mistakes of fact, and vice versa. … hunting law case: that prohibited hunting when a red flag flies over the Fish and Game department and allows it when a green flag flies. If a colorblind hunter mistakes red for green or green for red, has he made a mistake of fact or a mistake of law?"[433] Husak, argues that Alexander's approach could be overcome by categorising not as 'cases' of mistaken fact/law but 'propositions'.[434] Certainly, the use of fact and law as a *differentiator* can be ambiguous in some cases because it does not convey a suitable ground for differentiation. But also, and more importantly, the

[432] See chapter 1.
[433] L. Alexander "Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles" *Law and Philosophy* (1993)12:33
[434] D. Husak *Ignorance of law: A philosophical Inquiry* (2016) at p105

use of error of law as a category encloses ideas and concepts with different normative properties. For example, in the description of criminal conduct institutional/normative factors are used. These factors, that are *not* an essential part of the commanded or prohibited conduct, can be mistakenly constructed by the agent. In such cases, should they belong to the same category as mistakes about commands or prohibition itself? Should a false belief about 'ownership' be classified in the same category as a false belief about the prohibition to vandalise properties belonging to others?[435]. As *Smiths'* case demonstrates, it obviously should not. A classification made in this way becomes an inoperable categorisation. The result of this traditional arrangement is that in some cases mistakes of law could receive the same treatment as mistake of fact (or *vice versa*) without any coherent reason. In addition, the binary solution provides a principled solution for false beliefs about defences. Are they mistakes of fact or mistakes of law?

Regardless of the above arguments, the division between error of fact and law is widely accepted. Westen has provided a commonly established test for this differentiation: "an actor makes a mistake of law … if he is in need of the services of a good lawyer… An actor makes an error of fact … if he is in need of a good private investigator".[436] This bipolar description differentiates between empirical and legal facts. Unfortunately, reality is not as simple as Western pretends. First, no arguments are provided to justify why factual beliefs should be treated differently from legal ones. Further, although it is acceptable that empirical facts (brute) form a homogeneous group; the non-empirical beliefs (legal/normative) are not a consistent unit. In this second group the categorisation defended by Westen includes two obviously dissimilar non-empirical elements highlighted above: on the one hand, under the heading of mistake of law, he refers to conduct which is legally prohibited, permitted or commanded; on the other, under the same heading it includes any definition of legal elements required in shaping this prohibited or commanded conduct. These complementary legal or institutional/normative components of the norm are not necessary by themselves. They are necessary merely to give form, shape or content to the prohibition or the conduct commanded in the criminal norm.

[435] See *R v Smith* [1974] QB 354.
[436] P. Westen "Impossible Attempts: A Speculative Thesis" *Ohio St. J. Crim. L.* (2008) 5:523 at p535

Furthermore, this dual categorisation does not provide a genuine solution for false beliefs about permitted conduct (defences).

Once the traditional incoherencies of the dual law/fact differentiator have been exposed, a sequence of examples could help to find a suitable differentiator in the categorisation of false beliefs. We can take, for example, four dissimilar versions of the facts behind the Scottish case *Clark v Syme*.[437] In the original case, sheep from a neighbouring property were in the habit of straying on to a farmer's land. The owner of the land delivered an ultimatum to his neighbour, stating that he would shoot the sheep if he continued to allow them to trespass. After a three day notice period, he shot and killed a sheep.[438] In this original version of the case, Mr Syme's false belief was about a purported permission. He falsely believed that after the notice he was legally entitled to defend his property killing the invasive sheep, under a misconception of what his legal remedies might be. Currently this false belief is treated as an error of law that usually does not exonerate an agent of criminal responsibility.

In a second variation of this case, a farmer kills one of his neighbour's sheep in his field, falsely believing it to be a red deer. In this case, the false belief may refer to imprudent or reckless conduct in confusing a sheep with a red deer. This false belief encloses the conventional elements for an empirical mistake currently categorized as an error of fact. This kind of error currently exculpates the agent when it negates the *mens rea* element.

A third variation shows the farmer killing a sheep falsely believing that he can lawfully kill any animal (domestic or wild) that trespass on his property as an exercise of vindication of his own rights of domain. In this case, the farmer may have the false belief that no criminal norm prohibits him from killing an animal that is grazing in his

[437] 1957 JC 1, 5

[438] The farmer was charged with maliciously shooting and killing a sheep. The Sheriff-Substitute held that the presumption of malice was adequately displaced because the respondent believed that in the circumstances he had a legal right to shoot the sheep, and he found the respondent not guilty. It was held on appeal that no question of a presumption of malice arose in the crime of malicious mischief which involved either a deliberate and wicked intent to injure, or a wilful disregard of, or indifference to, the rights of others, and that a misconception of one's legal remedies did not render such action less criminal

field. This third case matches up with the requirements for those currently categorised as errors of law that do not currently exonerate the agent.

Finally, in a fourth version of the case, the farmer kills the sheep, aware of the prohibition of killing animals that are not their own, but falsely believing he is a 'qualified owner' of the sheep. In this case the farmer has a mistaken belief about the extension of the legal concept of 'qualified ownership'. Under Scots law, wild animals and birds cannot be the subject of absolute ownership. But under the legal heading of qualified ownership some people can, in certain circumstances, be regarded as the qualified owner. Qualified ownership arises, for example, if a person lawfully takes and tames a wild animal. In this case the animal becomes the property of this person until it is released or it escapes. Another way to become qualified owner of a wild animal was established in the case of *Blades v Higgs*[439] using the '*rational soil*' principle*:* any wild animal killed becomes the absolutely property of the owner of the land on which it dies. In this final version of the case maybe the farmer, misunderstanding the relevant property law about wild and farming animals, falsely believes that he can claim qualified ownership of any kind of animal killed on his land. And for that reason he (mistakenly) believes that he can lawfully shoot and kill the sheep. These kinds of mistakes, as discussed above, are currently treated sometimes (although arbitrarily) as an 'error of civil law' that exonerates the agent when the mental element of the crime can be said to be negated.

The dissimilar nature of the false beliefs outlined above demands a dissimilar treatment beyond the dual fact/law classification traditionally accepted. Thus, consistent with the four categories highlighted above and within the institutional conceptual framework and terminology developed in previous chapters, this second part of the thesis will systematise and provide a principled account of false beliefs in four categories: a) false beliefs about *brute facts*; b) false beliefs about *institutional facts*; c) false beliefs about commanded or prohibited conduct, referred to here as a

[439] 11 H.L. Cas. 621, 11 Eng. Rep. 1474 (1865)

false belief about an *institutional command*; and d) mistaken beliefs about permitted or justified conduct (defences).[440]

The purpose of any criminal norm is the prohibition, permission or command of particular conduct. In order to shape this prohibited, permitted or commanded conduct the lawmaker uses brute and institutional facts. Brute facts, as it was highlighted in chapter 3, are those disassociated from the perception or belief of the witness. They can be described with reference to physical or chemical properties (e.g. a person's age). On the other hand, institutional facts are those phenomena related to the spectator's awareness. They arise when members of a society collectively believe they exist and cannot subsist unless the community collectively recognises them as existing. In a sense, its nature is socially attributed and consequently changeable (e.g. sexual consent). As pointed out above, these institutional facts are necessary merely to shape or describe the prohibition, the permission or the commanded conduct. They are not constitutive elements of the prohibition or command itself. The next chapter will deal with the categories of false beliefs about brute facts. A practical explanation of the manner in which the ECCR applies to cases of false beliefs about brute facts will be also provided. Thereafter, chapter 6 will illustrate the way that the ECCR operates in cases of false beliefs about institutional facts. Finally, chapter 7 will resolve those cases where a false belief about the commanded or prohibit conduct itself exculpates the agent according with the ECCR.

[440] A full analysis of mistaken beliefs about permitted or justified conduct is beyond the aim of this project. For that reason, and although the research leaves open lines of argumentation about the topic, mistaken beliefs about defences are not going to be discussed in depth in this research.

CHAPTER 5

FALSE BELIEFS ABOUT BRUTE FACTS

5.1 Introduction

I have claimed that the traditional mistake of fact/law dichotomy should be superseded by a new categorisation of false beliefs. This chapter expands and develops this argument applying the ECCR to false beliefs about brute facts. Before then, section 5.2 will criticise the outcomes distilled from the current mistake of fact category. Thereafter, section 5.3 discusses the feasibility of a sound distinction between brute and institutional facts within the framework of a criminal norm. To achieve this, the chapter endeavours to identify a critical differentiator quality that makes a cognitive difference in the responsibility of those who act under a false belief abut brute facts or institutional facts. Section 5.4 concludes with the view that the perception process of brute and institutional facts are entirely dissimilar. Adopting the terminology proposed by Kahneman concerning two systems that the brain uses to process information, brute facts are connected with the heuristic system 1 (fast thinking), whereas institutional facts are connected with the analytical system 2 (slow thinking). Sections 5.5 and 5.6 frame false beliefs about brute facts and puts the ECCR into practice. Finally, section 5.7 explains the two main reasons this thesis proposes an autonomous (from *mens rea*) solution for cognitive conditions: firstly, the controversy that the attachment of cognitive conditions to the mental element would bring about; and secondly, the conflict that this solution would introduce in the adjudication of strict liability offences.

5.2 The "dead end" of the current solution about error of fact

The retributivist conception that the function of the criminal law is punishment justification finds in this area of the law its strongest epitomic illustration. Most of the

judges, scholars and legislators must deal with this issue implying that the key purpose of the criminal law is to achieve retributive justice by punishing those morally culpable. In doing so, an evident substantive law issue – how the criminal law should deal with false beliefs – has been transposed to the adjudicatory level. Effort has been devoted to developing procedural mechanisms to solve the issue on a case-by-case basis. In any case, the aim of this context-sensitive approach has been to ensure a higher number of convictions (particularly in sexual offences) instead of developing a fair, principled, coherent and systematic solution that can guide and protect citizen's expectations.

Before progressing to the development of the fresh approach proposed in this research, it would be helpful to scrutinise the dead end to which the leading current academic debate in common law jurisdictions, based on the elasticity of the *mens rea* element, has taken the solution for false beliefs about brute facts (errors of fact). It was pointed out in chapter 1 that criminal law has traditionally dealt with false beliefs about brute facts through the *mens rea* element and under the heading of 'error of fact'. Accordingly, this solution does not operate as a substantive defence but as a failure to proof, also referred to as 'absence of an element defences',[441] 'evidential defences',[442] or 'denial defences'. The agent is exculpated because the prosecution fails to prove the required mental state element of the offence. There is an obvious procedural element implied here. The burden of proof lies on the Crown prosecutor who has to prove the requisite intent of the defendant. So, for example, the hunter who kills another hunter mistakenly believing them to be a red deer can use the defence of error of fact. This solution is based on the argument that murder implies the intentional or reckless killing of another human being. The prosecutor must therefore prove that the hunter's intention was to kill a human being. As this is not the case, the hunter's responsibility would be excluded because he does not have the *mens rea* for murder (he has the intention to kill a red deer). Since the conviction for a crime requires the *actus reus* and the *mens rea* element to be present, to convict the factually mistaken hunter would involve punishing him unlawfully.

[441] See P.H. Robinson "Criminal Law Defences, a Systematic Analisys" *Columbia Law Review* (1982) 82:204 at 204.
[442] V. Tadros *Criminal Responsibility* (2005) at p103

The scrutiny of two particular issues in the sexual offences field will be revealing about this policy. The first has concerns the topic of an 'honest and reasonable belief' about consent to intercourse.[443] The second is understood under the generic term of statutory rape or, more precisely, strict liability offences as to the age of the complainer (under 13 years in Scotland).[444] The initial inference that can be reached from the cases and legislation on these topics is the disregard that judges, legislators and scholars have had towards the human ability to be guided in our deliberation process by legal norms and, consequently, their disinterest to draft a cogent and precise description *ex ante* of the prohibited conduct. Once, and only once, the criminal conduct has been precisely defined, can and should a coherent principled adjudicatory solution for those situations where the agent acts with a false belief be prescribed.

At first sight, the current framework for error of fact could imply that this is an uncontroversial field. However, disagreement has emerged firstly within the subfamily of false beliefs in the field of sexual offences, under the epigraph of 'reasonable belief in consent'[445]. Conversely, it has been discussed as an isolated adjudicatory topic and it is even difficult to conclude that the conclusions reached can be applied or extended beyond sexual offences. Finally, and remarkably, another subfamily of false beliefs within the sexual offences classification, offences against children under 13 years old, has been settled as a strict liability offence as to age without manifesting academic controversy or disagreement. The outcome of this approach is that there exists no defence of (reasonable) false belief about the age of the complainer. At this point, and as aforementioned above, a close scrutiny of the current treatment for these two subfamilies will be enlightening about the inconclusive and fragmentary state of this area.

Let us start with the issues surrounding the requirement that a belief (generally speaking) should not only be honest but also reasonable in order to excuse.

[443] A false belief about an institutional fact under my proposed categorisation.
[444] A false belief about a brute fact under my proposed categorisation.
[445] "DPP v Morgan" in P. Handler, H. Mares and I. Williams (ed) *Landmark Cases in Criminal Law* (2017)

Traditionally, it seems that in English law any mistake of fact had to be reasonable.[446] The problem with this approach is that unreasonable mistakes of fact may negate, in some cases, the proof of subjective intention or foresight maintained by the accused in some offences.[447] The controversy was settled in 1975 in *DPP v Morgan*[448] where the reasonableness requirement was replaced by the subjective "inexorable logic rule".[449] In *Morgan*,[450] it was held that if the mental element is absent for one of the conduct elements specified in the definition of a crime then, as a matter of inexorable logic, the agent should be exonerated. Demanding that belief about consent must be reasonable would convict the agent for something that in actuality he did not intend to do.[451]

This leading case also clarified that a false belief about consent in rape was considered a denial of the required *mens rea* (intention), and not a substantive defence of rape. As Lord Hailsham explained: "Once one has accepted, […] that the prohibited act in rape is non-consensual sexual intercourse and the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic […]. Either the prosecution has to prove that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails". This passage reverses and distinguishes the rule established in *Tolson*[452] and other cases that require the agent to have reasonable grounds for his false belief in order to use error of fact as an excuse. With this new approach, *Morgan* opened a well-known contentious debate about the reasonableness or not of mistake. After *Morgan*, judges seem only sometimes to firmly follow the "inexorable logic rule",[453] while on other occasions they opt for a more moralist or context-sensitive approach.[454] Furthermore, the dispute about reasonable belief established in Morgan has extended the controversial reasonableness test to defences.[455]

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[446] *Rose* (1884) 15 Cox CC 540.
[447] See Section 8 of the Criminal Justice Act 1967
[448] (1976) AC 182.
[449] See A. Ashworth *Principles of Criminal Law* (Ox 2009) at p218
[450] See L. Farmer "DPP v Morgan" in P. Handler, H. Mares and I. Williams (eds) *Landmark Cases in Criminal Law* (2017)
[451] *DPP V Morgan* [1976] AC 182 (HL) 210 B-C.
[452] (1889) 23 QBD 168 (CCR).
[453] See *R v Kimber* ([1983]1 WLR 1118; see also *B v DPP* [2002] 2 AC 428
[454] See Graham (1982) 74 Cr App R 235;
[455] Five years after the *Morgan* ruling, the Divisional Court modified the rule in *Albert v Lavin* (1981) 1 All ER 628 (DC) arguing that the "inexorable logic test" would apply only to definitional

The Sexual Offences Act 2003 (and 2009 in Scotland) involved a change in the law from the honest belief test in Morgan (or *Jamieson*[456] in Scotland) to a reasonable belief test[457]. In order to attribute responsibility, the assessment takes into account both the accused's personal capacity to evaluate consent as well as its reasonableness. If the defendant did honestly believe that consent was given, this belief must be reasonable. However, contrary to *Morgan*, it will be for the jury to decide whether a defendant's belief that consent was given is reasonable or not. Although it may not seem so, this is not a completely objective (reasonable man) test as some of the personal beliefs of the defendant are relevant to a degree. However, both the final belief about consent and the modus by which the defendant has reached it is assessed in an objective way. This adjudicatory solution has apparently provided some resolution to this issue.

Either way, the long academic-judicial debate about this topic has missed the point: a purely substantive law issue concerning how the criminal law should deal with false beliefs about a definitional element of an offence has been transferred to an adjudicatory level. The academic or judicial determinations only attempt to emphasise which test should be applied in court. This attitude tries to resolve in the adjudication process what has not been appropriately determined as a substantive law principle. The disagreement has been framed and reduced to a binary procedural assessment of objectivity versus subjectivity. This well-known twofold approach concerns a purported 'elasticity' of the concept of *mens rea* and, in the context of false beliefs, whether to negate the mental requirement the belief need only be honest or must also

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elements of an offence. To be entitled to a defence, the agent must prove that his mistake was reasonable. This was a case of self-defence against an assault inflicted by a law enforcement agent. Here the definitional elements of the offence were present – intentional inflicted force – and thus the key point to be resolved by the judge was whether or not the assault was lawful. Confronting this question, the Divisional Court ruled that force used on the basis of an unreasonable belief was unlawful force. Later, the Court of Appeal in *Glaston Williams*[455] overturned the above Divisional Court ruling. In this case, the court understood that unlawfulness is an element of all crimes of violence, not merely a consideration for a defence as held by the Divisional Court. Therefore, the *mens rea* of assault is not 'an intent to apply force and not more' but 'the intent to apply unlawful force to the victim'. As a result, an agent who falsely or mistakenly believes that the use of violence is lawfully inflicted to protect another from an attack should not be criminally liable. In short, the key question to unravel is whether the concept of *mens rea* should embrace unlawfulness as a definitional element of a crime or, as Simester defends,[455] that only when both *mens rea* and *actus reus* are present can the conduct be typified as unlawful.

[456] *Jamieson v HMA* 1994 JC 88.

[457] Sexual Offences (Scotland) Act 2009 Section 16

be reasonable. It also questions, in some cases, whether the defendant can be convicted without the need to prove *mens rea* at all in relation to one or more elements of the definition of a crime (strict liability offences).

The outcomes are in any case inconsistent and divisive. On one hand, the subjective *Morgan* principle could be construed as a "rapist charter"[458] that could embolden Adonis-esque males flamboyant of their own irresistibility and immunity against any conviction of rape. On the other hand, the later legislative solution could convict an agent of intending to do that which in truth he did not intend to do. In any case, neither of these perspectives recognise the real nature of the problem in its just terms: the need for a precise *ex ante* definition of the criminal offence, and thereafter a principled way to determine how false beliefs about definitional elements of the defined offence should be *substantively* answered. This failure to understand the essential features of the problem is more alarming in a case like *Morgan* where, as Farmer recognises, the problem was "[…] understood as one of principle, a matter of the academic structure of the criminal law".[459] This approach also raises not only circumstantial but structural methodological concerns about the way criminal legal theory can be developed in the courtroom.

However, the final legislative solution stated in the Sexual Offences Act 2003 is neither suitable nor conclusive. In order to comply with the legality principle, lawmakers should have to provide a precise description of the actions or omissions considered criminal and which deserve criminal punishment. This description should include all the objective (*actus reus*) and subjective (*mens rea*) elements. The drafting of legal norms about rape or any other offence should be addressed to citizens in order to guide them in adjusting their (sexual) conduct to the meaning of the institution of consensual sex at a particular time. In doing so, special attention must be paid by the lawmaker to those institutional concepts (like consent) whose meaning is susceptible to change in the new legal framework. That suitable norm should include a cognisable and guiding description of those institutional elements of the criminal offence (like consent) that could be contentious or confuse. This involves a detailed description of

[458] T. Jennifer *Rape and the Legal Process* (2002) at p119
[459] L. Farmer "DPP v Morgan" in P. Handler, H. Mares and I. Williams (eds) *Landmark Cases in Criminal Law* (2017) at p247

the behaviour we should *expect* from others in sexual relations. Once, and only once, the prohibited conduct has been properly described and framed, the criteria of responsibility can be established in cases where, unknown to the agent, there exists a component or factor that constitutes a definitional element of a crime in his actions. This implies something more than the renaming of a reasonableness test in order to attribute criminal responsibility, which is precisely what the 2003 Act and previous case law seem to have done. This requires a resolute test or judgment that appraises the epistemic condition of the citizen.

Another significant heading which evidences the currently inadequate and manifestly unfair situation surrounding false beliefs is statutory rape. Section 5 of the Sexual Offences Act 2003[460] makes the penile penetration of a child under 13 years old an offence, with strict liability as to the age of the complainer. Thus, the act is criminal irrespective of whether or not the victim gave consent, and irrespective of the belief of the defendant regarding the victim's age. The main justification for such an offence is that a child under 13 years does not have the legal capacity to consent to any form of sexual activity, under any circumstances. More about this case will be discussed at the end of this chapter when the impact of the ECCR in strict liability offences is considered. For now, it is important to highlight that, as demonstrated in the recent Scottish case of *HMA v Daniel Cieslack,*[461] courts are also of the opinion that the approach taken in this area is flawed.[462] The High Court in Glasgow took the decision not to sentence and instead absolutely discharge a 19-year-old boy who plead guilty of rape of a girl under the age of 13. A description of the facts of the case will illustrate that the Sexual Offences (Scotland) Act 2009 is out of step. The 12-year-old victim travelled to Edinburgh to meet up with some friends. The complainer and her friends were drinking vodka in the Princes Street area and at around 3.30am the victim spent some time speaking with police officers who were looking for one of her friends. In court, the officers gave evidence that they had no concerns about the age of the victim whatsoever. Later, at 4am, the complainer met the defender in a taxi queue and they decided to travel together to a party in a student's flat. The taxi driver testified that he had the impression that the victim was about 20 years old. Once in the

[460] Section 18 Sexual Offences Act 2009 uses similar terms to criminalise sexual activities with children under the age of 13.
[461] HMA-v-Daniel-Cieslak Unreported 17 March 2017
[462] In this case Lady Scott was in a position to reject the current law on the topic.

flat, the victim confirmed to the defender she was over 16. Even Judge Lady Scott asserted that "for what it is worth my impression from viewing the victim on the CCTV footage on assessment by appearance that the victim was over 16 years of age would be a reasonable one."[463] *A*t some point during the night the victim and the defendant engaged in sexual intercourse. She left the flat the next morning without concerns or any sign of her being distressed. Lady Scott stated, "… I do not consider there is any need for, or public interest in, punishment. To do so would in my view be disproportionate given the nature of criminal culpability here."[464] This case clearly illustrates the potentially unjust outcome of a legal norm that convicts a defendant even though he is genuinely ignorant of one or more factors that made his action or omission criminal.

In summary, the current solutions to false beliefs about a definitional element of an offence, range from draconian conviction to acquittal through absolute discharge, without a coherent rationale. Beyond the potential arbitrary and unjust adjudicatory consequences there are two things that are judicially, legislatively and academically inconceivable: first, the indifference towards the relevance of a proper and comprehensive description of criminal offences. In its place, the emphasis has been on deciding what kind of test should be applied in order to attribute criminal responsibility on a case-by-case basis. Secondly, the lack of a proper analysis of the different categories of false beliefs that empirically occurs. We can take both statutory rape and reasonable beliefs about consent as examples of this. Neither topic has been categorised as one of a false belief.[465] Both are appraised separately but for the wrong reasons. They are in fact heterogeneous and not conceptually analogous, but the real reason of this dissimilar categorisation is not discussed, or even cited. The actual age of the complainer refers to a physical feature. It is a physically measurable temporal ratio from the date of birth to the day of the commission of the offence. It is a classic *brute fact* disassociated from the perception of the defender. On the other hand, the definitional element 'sexual consent' is an archetypal *institutional fact* that depends for its existence on (changeable) human agreement. Consequently, the meaning of this definitional element could and should change over a period of time. The nature of

[463] HMA-v-Daniel-Cieslak Unreported 17 March 2017
[464] Ibd
[465] A noticeable exception can be found in J. Chalmers and F. Leverick *Criminal Defences and Pleas in Bar of Trial* (2006) chapter 12

both types of definitional elements is clearly dissimilar. Due to this divergent nature, the perception process (and potential false beliefs about them) by a rule abider is also different. Where brute facts can be perceived instantaneously by our senses, institutional facts require a more intellectual process of perception or discernment. It requires a more detailed comprehension of the institutional framework we are dealing with. It also requires an updated knowledge about the current meaning (i.e. social, customary, normative) of the institutional fact. It is precisely this cognitive/epistemic variation that should compel a dissimilar academic/judicial scrutiny, treatment and outcome.

5.3 A feasible distinction between brute and institutional facts in the criminal norm: searching for the "critical quality"

To define the prohibited, permitted or commanded conduct, the lawmaker uses brute and institutional facts. Brute facts, for example a red deer or a human being, are those disassociated from the perception or belief of the witness. They can be described with reference to physical properties of the object, like biological age for example. On the other hand, institutional facts, for example sexual consent, are those phenomena related to the awareness of the spectator. They arise when members of a specific community collectively believe they exist and cannot subsist unless they are recognised as existing. As highlighted above, these institutional facts or elements must be distinguished from the prohibition or command itself. They are necessary merely to shape or describe the prohibition, the permission or the commanded conduct that is the genuine core of the criminal norm.

But this proposed distinction is not exempt from debate or discrepancies. Let me start by considering the argument that a feasible distinction between the different elements used in the description of a crime does not exist. That is, that a feasible distinction between brute and institutional facts or elements in the definition of a crime does not exist. Two opposite approaches will result from this hypothesis. The first assumption would imply that any element used in the wording of a norm that shapes the extension of a criminal offence are pure brute facts, descriptive in nature. The second would support the argument that any element or concept incorporated in the description of a crime becomes institutional.

The first proposition would uphold that a prohibited or commanded conduct can only guide the agent if the criminal norm defines the material elements of the prohibition or command. In drafting the criminal norm, the lawmaker portrays those factual or empirical situations that the norm commands or prescribes. Different elements or concepts can be used in drafting a norm. Some elements can be strictly comprehended by sensorial observation where others might require a more sophisticated intellectual understanding. But isolated, any particular element or concept included by the draftsman or judge in the shaping of the prohibited or commanded conduct is rigorously descriptive in nature. The (purported) institutional character belongs to the whole norm that shapes the prohibited or commanded conduct, and not to each of the particular fragments by which the criminal conduct is moulded.

In contrast, the second approach suggests that any concept or element included in the description of the prohibited or commanded conduct is institutional in nature. Any fact, object or any natural, cultural or psychological phenomena used by the lawmaker becomes institutional. Its inclusion in the criminal norm transforms its quotidian (brute) meaning towards a new normative sense. Thus, in describing a prohibited or commanded conduct, two different types of concepts, facts or elements are initially used. For example, red deer or property are concepts with obviously different natures. But in some sense, their presence within a criminal norm transfers to them normative/institutional sensitivity. Take, for example, the term or element 'persona': different disciplines have a different scope of the concept of 'person', but its institutional meaning in the criminal norm can only be properly grasped through the law as discipline, regardless of the meaning that this concept might have in other ambits. Every particular discipline, like biology, ethnography or psychology secures its own limits of the concept of persona. Law does the same in its particular institutional way. The description of persona referred to in law could differ from the same element in biology. For example, the law recognises the succession rights of the *nasciturus*[466], expanding the concept of persona beyond what biology could support. Also, the concept of death sustained in medicine or biology differs from the legal

[466] An unborn child, if subsequently born alive, is to be considered as already in existence whenever it is to its own advantage, as with succession.

definition of death. The law regulates the donation or extraction of organs for transplant. Law also delimits when an organ can be extracted and regulates when a person that is not clinically or medically deceased has normatively lost their personhood and their organs can be donated.

Thus, in short, it seems consistent to argue that once the element is incorporated into the definition of a criminal norm, a rigorous distinction between pure brute or institutional fact could be problematic. As discussed above, it could be possible to support the claim that any institutional element incorporated into a criminal norm has a brute nature. But it can also be defended that the law institutionalises any element incorporated to the criminal norm. Perhaps a sharp and conclusive framework will be difficult to construct especially in particular cases. But beyond this profound debate, at least intuitively, it looks evident that an essential difference exists between concepts like 'red deer' and 'ownership' even when incorporated into a norm. Hence, a different treatment should be provided for false beliefs about brute and institutional facts. In fact, as it will be defended later in this chapter, it is precisely the apparent differences in the perception process of both types of facts that justifies this dissimilar treatment.

That said, developing a classificatory theory about this matter would exceed the aims of this thesis. In any case, what is salient for our purposes is to discover the way in which knowledge or awareness about brute or institutional facts might affect the cognitive condition of responsibility. Particularly, whether the ECCR would apply differently or with different outcomes in cases of false belief about a brute or institutional fact. In short, what is relevant for our research purposes is to find out if there exists a *critical quality* that makes a cognitive difference in the attribution of responsibility of the agent who acts with false belief about a brute or institutional fact. This critical quality could only be identified if the agent has a cognitive difference identifying brute or institutional facts. That is, if a cognitive difference in the *perception* of brute and institutional facts by the agent exists.

However, could knowledge about brute and institutional facts be similarly or equally perceived? To answer this question we must evaluate the singular nature of brute and institutional facts. As stated above, both have an objective nature but only

institutional facts exist as far as (and to the extent that) they are collectively recognised within a social framework. So, it seems that according with its constitutive origin, an evident cognitive difference should occur in the perception process of both facts. Where a brute fact only requires an act of visual or sensory perception of the object or the idea (fast thinking),[467] institutional facts, on the other hand, require a deeper understanding or comprehension of their social meaning (slow thinking). Whereas the perception of a brute fact is merely graphic and actual, the true perception of an institutional fact requires the understanding of the social/institutional meaning of the object or phenomena. It therefore follows that if there is a cognitive difference in the appreciation between brute and institutional facts, it becomes appropriate to argue that a false belief about brute or institutional facts used in the description of a criminal offence would affect the cognitive condition of responsibility dissimilarly. Consequently, a different principled outcome should be provided for the criminal responsibility of the agent who acts with false beliefs about institutional or brute facts present in the criminal norm.

5.4 Perception process as the basis for the "critical quality"

Traditionally, perception can be defined as the organisation, identification, and interpretation of sensory information in order to represent and understand the environment where we interact.[468] In this research, we construct perception as a wider process founded in sensory inputs. To conform our opinions about reality and guide our human behaviour, we go through a process of translating impressions into a coherent and unified view of the world around us. This process can be split into what Berstein labels as *bottom-up* and *top-down* processes:[469] firstly, the agent processes inputs that transforms low-level information (stimuli) to higher-level information (bottom-up). Raw sensations are analysed into basic features, such as edges, colour, form, etc. After that, these features are recombined at higher brain centres, where they are connected with the agent's concepts, knowledge and expectations (top-down). We recognise a red deer as a red deer because its features (four legs, size, grazing, etc.) match our perceptual category for 'red deer'. In the top-down process, previous

[467] This terminology reflects the work in the field of Daniel Kahneman that will be explored later in this chapter.
[468] S. Daniel *Psychology* (2011)
[469] B. Douglas *Essentials of Psychology* (2002) at pp123-124

experience and knowledge of the world allows the agent to make inferences about the identity of stimuli, even when the raw information is poor. For that reason, a blur shape grazing in the dark forest can be recognised or identified as a red deer by a hunter because the stimulus occurs at a location where, according to his prior knowledge and experience, he would expect a red deer to be.

This top-down processing (also called data-based processing[470]) is based on knowledge. Knowledge in this context is any internal information that the perceiver brings to the perceptive process (memories). Contrary to the external stimuli (bottom-up) that provide the starting point for perception, the top-down moment condenses a person's prior knowledge or expectations. This prior information is used to articulate a perceptual appraisal of the environment that surrenders us before action. The perceptual process starts with the stimulation of the external receptors and then the top-down moment gives the perceiver feedback based on previous experience or knowledge. These accounts of the perception process seem to reflect a standard that suggests that the aspects of perception work or fail equally for any perceiver agent. However, our perceptive abilities are also related to those qualities, features or duties related to our role as status-holders in our society. Thus, the previous knowledge or experience recognising a red deer is different for an experienced hunter than for a weekend tripper.[471]

Now that the features of the perception process have been briefly outlined and explained we can flesh out the argument that perception processing, founded on epistemological considerations, is divergent in institutional and brute facts: where brute facts are perceptible directly by human senses, institutional facts require a more sophisticated comprehension process. The perception of the qualities and features of *brute facts* are usually actual and automatic; they require a sensorial perception or observation that takes place with minimum memory or reflexive effort. Its perception is effortless because this processing happens outside conscious awareness. For example, the perception that we are watching a red deer is actual and automatic. The reason for this spontaneous recognition resides in the way the bottom-up moment affects recognition or awareness. When we meet, for example, a new young girl or

[470] B E. Goldstain *Sensation and Perception* (2013) at p9
[471] Later in this section we will see how does affect the outcomes of the ECCR

boy, we receive external stimuli that we contrast with prior categorised information to formulate a perceptual evaluation of the individual. The knowledge that we bring to the situation can be information acquired years ago or recently assimilated, but an important quantity of knowledge is learned from our childhood and becomes part of our knowledge base. This knowledge influences our abilities to place our environment into categories. One of the categories we appraise is her/his age. Even more precise information, like age confirmation by the girl herself, helps our brain to construct our identification of the person's oldness. This categorisation process about brute facts continues with age and experience. Brute facts are not contingent, and they are perceived according with stable physical properties. They are not disassociated from the perception or belief of the perceiver because its existence does not depend on collective agreement about his existence or scope. For all these reasons, perception and recognition of brute facts are instantaneous.[472]

Not all the *institutional facts* used by the lawmaker in shaping criminal offences have the same level of normativity. Some graduation of institutional facts could be established. Some institutional facts just need a basic cultural or social evaluative judgement to be understood. Among this category of facts that require an extra-legal approach we can include concepts like immorality or dishonesty. To interpret them, the addressee of the norm should mainly use his vital experience. On the other hand, in the description of a criminal offence we can find institutional elements that require a more legal evaluative judgement. Some elements are regulated in private law disciplines like commercial or property law (e.g. ownership). Others are regulated by public law disciplines like administrative or constitutional law. Finally, some are regulated by the criminal law itself.[473] However, beyond this categorisation what is significant here is that institutional facts require some complementary judgement of value and that its nature is variable. They are not perceptible merely through human senses like brute facts. The perception and comprehension of institutional facts always implies some intellectual exercise and a more sophisticated top-down process.

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[472] This affirmation could be, in some cases, not as categorical as defended in the thesis. Certainly, we sometimes must take some time to study a person to work out how old they are; we may make an instant judgement but then we revise it as we look closer

[473] See the Sexual Offences Scotland Act 2009, sections 12-15 where the meaning, extension, scope and withdrawal are detailed

Indeed, the perception of institutional facts is not effortless, spontaneous or automatic. It needs a complementary valuable judgment and an intellectual implementation. This judgment of value scrutinises the meaning of the institutional concepts in the social institutional interaction. The agent confronting an institutional fact needs to appraise the changeable and contingent function socially assigned and recognised to the fact. This judgement requires a more reflexive process of comprehension associated with the level of socialisation of the agent. Take for example the concept of ownership or consent in sexual intercourse. The apprehension of what belongs to me or what belongs to others requires a deep understanding of the role that property plays in our institutional reality; it requires, certainly, a more reflexive judgement from the agent. Sexual consent is another institutional fact that illustrates dissimilar perception from brute fact. There is a big difference between consensual sex and rape, but this difference has been reformed over time due to the contingent nature of institutional facts. As it was mentioned above, institutional facts are valid and binding as far as members of a specific community collectively believe they exist. They cannot subsist unless society members recognise them. But institutional structures are in permanent change and transformation. And this transformation is transposed to the institutional facts in order to make the new operational framework within the institution clear for its users. In his recent book *Making the Modern Criminal Law* Farmer has highlighted, for example, how the social and scientific understanding of what counts as sexual offending has changed in the last century.[474] This transformation has been transposed, for example, to the institutional fact 'sexual consent'. As a result, a former model of 'implied' sexual consent is now constructed as 'affirmative' consent.

At this point, it is relevant to introduce the influential proposal made by Kahneman, a Nobel Prize Winner in Economics. Both his dual model of thinking and its relation to bias are proposals applicable with (and supportive of) this part of the research. Concerning the two systems that the brain uses to process information, Kahneman adopts the dual model terms proposed by Stanovich and West:[475] System 1

[474] L. Farmer *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) chapter 9
[475] K.E. Stanovich and R.F. West *Individual Difference in Reasoning: Implications for the Rationality debate? Behavioural and Brain Sciences* (2000) pp645-726

(fast thinking), is intuitive, unconscious, effortless non-statistical, gullible, stereotypical and emotional. It uses heuristic, mental shortcuts that focus on one aspect and ignore others. It solves, for example, 2 + 2. System 2 (slow thinking) is analytical, conscious, slow, controlled, requires effort, statistical and it is 'costly to use it'. It solves, for example, 23 + 45. System 1 forms first impressions and easily jumps to conclusions. System 2 does problem solving and deliberations. System 1 runs automatically, creating snap judgements, impressions and suggestions for system 2 that is involved only when we encounter something unusual that system 1 cannot intuitively process or solve. Nevertheless, system 1 is a storyteller. It seeks to build a coherent plausible story relying on pattern-matching and assumptions regardless of their quality or quantity. Sometimes a small set of non-representative information allows us to interact in the world as far as we are confident in its accuracy. An example from Kahneman's book will be illustrative: "A bat and a ball together cost $1.10 dollars, the bat costs $1.00 more than the ball. How much does the ball cost?"[476] If the answer you come up with was that the ball must cost 10 Cents you have used system 1 processing. Your brain has substituted the *"more than"* statement with an absolute statement that makes the maths easier but wrong: 10 Cents + $1.10 = $1,20. At this point, your system 2 processing takes the lead calculating and you realise that the ball costs 5 Cents and the bat (at a dollar more) $1.05 for a total of $1.10.

Kahneman also exposes another relevant theory to explain human biases: we often make our judgements according to the information we have available without reflecting that there might still be things we do not know; we just emphasise what we do know. Kahneman even has an acronym for this phenomenon of jumping to snap deliberations on the basis of limited information: WYSIATI or "what you see is all there is".[477] We take decisions based only on the evidence in front of us without considering what information is missing. Therefore, the search of system 1 for a believable story based on available information can sometimes lead us to WYSIATI; making wrong judgements because we do not consider absent evidence, or we assign causal relationships where there is none, or simply we take decisions due to heuristics.

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[476] D. Kanehman *Thinking Fast and Slow* (2011) at p79.
[477] Ibd at p118

Thus, system 1 can lead us astray if system 2 does not revise the judgement. These kinds of misjudgements are related to a type of bias frequently named the overconfidence effect. This effect is related to the extreme certainty of hindsight. Under this bias we promote excessive confidence that we know the truth. It also transfers excessive confidence in the accuracy of our beliefs. Overconfidence at the end is a miscalibration of personal probabilities where our confidence in our own judgements is bigger than the objective accuracy of those judgements.

It appears self-evident to connect brute facts with system 1 and wrong judgements on the basis of limited information (WYSIATI). As described above, brute facts are perceived automatically by a pattern-matching process. It will later be discussed how these connections and biases can affect false beliefs. For now, before expanding these arguments we need to consolidate the assumption that the perception process is different in both kinds of facts. However, this assumption does not by itself justify the *critical quality* unless it affects the *cognitive condition of responsibility* of the agent in dissimilar ways. Let me explain the undeniable reason whereby it does. The agent, before action, is aware of the reality that surrounds him. He additionally always has a base of previous knowledge acquired by his process of socialisation or experience. When confronting a particular situation, he acknowledges some factual context about the world around him (top-down processing). Over this previous knowledge the agent acquires new inputs before action that he assimilates in his deliberation process (bottom-up processing). It is this latent and updatable knowledge that should trigger in the agent the doubt or suspicion that his action requires that they should further increase this basic initial knowledge. If this is the case, the agent must search for more information or abort her on-going action or behaviour. Therefore, criminal responsibility would be attributed when, despite the agent's base of previous and latent knowledge triggering in the agent the doubt that his action could be criminal, the agent does not use their capabilities to ascertain the truth, and they carry on with the action. In this case, the false belief does not exonerate the agent of criminal responsibility because he does not translate his doubts into further investigations. It could be deduced *a contrario sensu* that when the latent, previous knowledge is not enough to trigger in the agent the doubt that his action requires more inquiries, the agent is not criminally responsible. This conclusion is not as straightforward as it intuitively looks. This hypothesis will be considered later in

depth when the ECCR is put into practice. For now, and accordingly with the critical quality explained above, we are in the situation to conclude that the process of acquiring knowledge and making judgements is different for brute and institutional facts. As Kahneman illustrated, the perception and judgements of brute facts made by system 1 is instantaneous, effortless and involves the brain using heuristic techniques. This type of deliberative process is more prone to lead us to WYSIATI. The possibility of ignoring absent evidence is higher when appraising brute facts under system 1. As a result, it seems that, at least intuitively, a false belief about a brute fact must be easier to excuse than an error about an institutional fact that always requires deeper considerations. The evaluative judgement that an institutional fact demands makes it easier for the agent to trigger doubts that his action could be criminal. This argument supports the different model of attribution of responsibility for false beliefs about brute facts and institutional facts here presented. This is the aim of the next part where the ECCR would be applied first to false beliefs about brute facts and later (chapter 6) to false beliefs about institutional facts.

5.5 False beliefs about brute facts

The agent acts with false beliefs about a *brute fact* when, unknown to him, a component, factor or element that constitutes a definitional element of a criminal offence, exists in his action, this component being a brute fact. We can return to the red deer example to illustrate this concept. According to *Drury v HMA*,[478] in Scots law murder occurs when a person takes the life of another person either intentionally or in circumstances where the accused exhibits a wicked recklessness as to whether the victim lives or dies. In this definition, taking the life of another person is an essential element of murder. So, if the agent shoots another person while hunting because of his false belief that he is shooting a red deer, he acts with a false belief about a brute fact, here the concept of "person". There was, in his action, an essential component of murder. However, this brute fact was unknown to him due to his false belief that behind the bushes was a red deer grazing.

[478] 2001 SLT 1013

As highlighted above, the current solution for these cases (as a failure of proof defence) rests on the negation of the *mens rea* element. If the agent believed that behind the bushes there was a red deer instead of another person, this false belief precludes the *mens rea* of murder required in *Drury*. The only possible controversy in the attribution of responsibility could be whether or not the landmark decision in *Morgan* discussed above should be distinguished, that is, if reasonableness about consent is required. It was discussed above how in some cases the genuine and/or reasonable belief of the agent affects the required *mens rea* for murder. The only significant exception to this *mens rea* test arises in cases of false belief (mistake of fact) in crimes of strict liability. In these cases, the *mens rea* does not need to be proven in relation to the elements of the *actus reus*. Thus, the agent will be convicted even though he was genuinely unaware of one or more factors that made his conduct criminal. Few exceptions have been made to the rule of irrelevancy of mistake of fact in strict liability offences. One of these rare exceptions was a strict liability drink-driving offence adjudicated in the Australian case *DPP v Bone*.[479] In this case the accused had vodka mixed into his beer without his knowledge. As a result, the quantity of alcohol consumed by the accused was significantly greater than that which he believed he had drunk. For that reason, the court concluded that the defence of honest and reasonable mistake was not precluded by the mere possibility that the accused may have had the lower range of alcohol in his blood if the facts that he believed to be true were actually true.

Where the ECCR would work unequivocally alongside offences that require intention, its practicality could seem *prima facie* more intricate in those instances where the offence's definition requires some degree of unjustified risk-taking (recklessness/negligence) for conviction. The potential puzzlement derives from the inherent epistemology of risk; where there is a risk, there is always something that is unknown or has an uncertain outcome. Thus, awareness of risk is in some way knowledge about lack of knowledge. As this research proposes from the beginning a model of responsibility based jointly on volitional and cognitive/epistemic states[480], in order to avoid potential

[479] (2005) NSWSC 1239
[480] See introduction at p1

confusions, this area needs some clarification before fleshing out the ECCR in practice.

The majority of Anglo-American systems of criminal law are converging around what Stark describes as the "Standard Account" of culpable unjustified risk-taking[481]. This account differentiates between awareness-based culpability (recklessness) and inadvertence–based culpability (negligence) for unjustified risk-taking. The disposition of the agent to act despite his *awareness of the risk* attendant upon his behavior lies at the heart of the standard account of culpable carelessness[482]. Some authors, like Husak[483] and Duff[484], construed the account of awareness of risk in terms of knowledge. In this way, knowledge of risk is at the essence of recklessness. Others, like Stark, asserting that "a defendant is aware of a risk when she believes that it exist" [485] argues that nothing more than belief is required for awareness of risk. As it has been recurrently claimed in this research, I want to contribute to the debate about the conditions of criminal responsibility arguing for a broader approach that looks at the epistemic conditions rather than narrow conceptions of *mens rea*. For that reason, it is beyond the aims of this research to scrutinize or engage in the development of matters that could contribute to make issues of risk (or its awareness) complicated from an epistemological point of view. However, some of the literature and cases discussed in the field of awareness of the risk discusses central issues with which this thesis is concerned.

In any case, the ECCR formulated in the previous chapter explicitly recognized that "The agent who performs a criminal action is responsible when, *satisfying other conditions for responsibility*, […]". These other conditions, like

[481] F. Stark *Culpable Carelessness, Recklessness and Negligence in the Criminal Law* (2016) at p26
[482] Ibd at p90
[483] D. N. Husak "Negligence , Belief, Blame and Criminal Liability: The Special Case of Forgetting" *Criminal Law and Philosophy* (2011) 5:199 at p208
[484] R.A. Duff, "Caldwell and Lawrence: The Retreat for Subjectivism" *Oxford Journal of Legal Studies* (1983) 3:77 at 80. It is relevant to point out about Duff's proposals that although he classifies three levels of knowledge relevant to the discussion of awareness od the risk (explicit, tacit and latent) this concept does not have the same extension that latent knowledge in the ECCR. About "background beliefs" in relation with beliefs formation see also, V. Tadro *Criminal Reponsibility* (2005) p250
[485] F. Stark *"Culpable Carelessness, Recklessness and Negligence in the Criminal Law"* (2016) at p140

mens rea or causation, also need to be satisfied in order to attribute criminal responsibility. This proposal does not challenge the requirements of the different levels of *mens rea* currently required for conviction. What is vindicated in this thesis is that alongside the fulfillment of volitional conditions (whether intention, recklessness or negligence), it is also necessary to satisfy an epistemic/cognitive condition for conviction. Therefore, in terms of the ECCR, it is irrelevant whether the hunter who shoots another person because of his false belief that he is shooting a red deer, acts intentionally or is aware (or not) of any risk. In any case, he would be exonerated if he does not fulfill the cognitive requirements recognized in the ECCR.

The proposal made in this research does not rest on the appraisal of the *mens rea* element to decide when the agent is culpably ignorant. In its place, the ECCR was proposed as an autonomous, algorithmic and principled solution. The ECCR endorses that when the agent's decision to act in the way he did reflects those reasons for action that constitute his will, he is fully responsible. However, in those cases where the agent acts unwittingly about some features of his criminal conduct, attribution of criminal responsibility can only be attributed if the agent was culpably ignorant. For those other (ignorant) cases, the ECCR includes a deontic element: the agent is not only criminally responsible when he *is* aware of the illicitness of his action but when he *should be* aware. Ultimately, the aim of this research is not only to raise a theoretical debate about epistemic considerations but also to deliver an operative device able to provide solutions for cases where the agent acts with a false belief. In this sense the ECCR is presented as a sort of compact algorithm able to ascribe criminal responsibility to the agent who was culpably ignorant about some features of his purported criminal conduct. In this sense, the ECCR has a pragmatic and practical ambition. It is time to see the ECCR in action.

5.6 The Epistemic Condition on Criminal Responsibility in practice

The reasons why false beliefs about brute facts are more prone to excuse than institutional ones were explained and defended above. The evaluative judgement that institutional facts require increases the prospects that doubts about the truth could

arise during the perception and subsequent deliberation process; suspicions which the agent must convert into further investigations in order to be excused. On the other hand, the almost instinctive perception of brute facts and the WYSIATI influence made them easier for misconceptions and bias. Either way, a more specific and principled mechanism is needed for the appraisal of the agent who acts with false beliefs about brute facts. The proposal made in this research is the ECCR. In the rest of this chapter we will apply its requirements to false beliefs about brute facts. In the next chapter the criteria of the ECCR will be applied to institutional facts. Once this has been completed, we will have developed a solid theoretical support for the argument about its dissimilarity excusatory nature.

It seems opportune at this point to recall the ECCR formulated in chapter 4:

The agent who performs a criminal action is responsible when, satisfying other conditions for responsibility, he is either aware that the action was criminal or he was culpably ignorant about some feature of the criminal act when he should have noticed it considering:

a) The latent and updatable information available to him.

b) The standard of awareness expected as status holder.

c) That internal or external circumstances do not diminish those individual, intellectual and physical capacities required to notice the need to update the latent knowledge.

Thus, according to the ECCR's first premise, criminal responsibility is directly attributed when the agent is aware of the criminality of his action.[486] The rationale behind this statement is clear: when the will of a well-informed agent crystallises in the final result he is unquestionably responsible. He wants to commit a criminal act (aware of his illegality and knowing the truth about any factor or component related to his conduct) and he decides to do it, welcoming any result from his action. Criminality here has a double dimension; it refers to both awareness about the command, permission and prohibition, as well as the lack of false beliefs about brute

[486] An extensive discussion about this issue will be provided in chapter 7

or institutional facts.

Furthermore, the ECCR also provides a deontic solution for those cases where the agent is not aware that his action was criminal. In these cases, the agent will be responsible if he is culpable for his ignorance. The ECCR outlined when the agent is culpably ignorant of his behaviour. In these cases, three requirements or factors need to be considered in order to attribute criminal responsibility to the mistaken agent: his latent and updatable knowledge; whether or not his failure to notice falls below his standard as status holder; and finally, an evaluation of his physical and intellectual capacities. Transposing this requirement to cases of purported false beliefs about brute fact will be the purpose of the rest of this chapter. So, at the end of this chapter we should be able to determine when the hunter who kills another human mistakenly believing them to be a red deer is criminally responsible for his action.

a) The latent and updatable information available to him

Human perception processes are subject to spatial and temporal limits. Every time we interact in the world we are aware of our surroundings; we are able to identify and interpret those objects or realities that are in our perceptive scope (spatial limit), during the time stimuli act over our senses (temporal limits), because we have memories. This knowledge and experience is at the heart of the adaptive success of humans as a species. Over this previous knowledge the agent acquires new inputs before action that the agent assimilates in his deliberation process (bottom-up processing). Knowledge allows us to foresee how natural phenomena can perform and consequently interact in a more efficient way to achieve our goals. Using the simile of a computer, human memory codifies, stores and retrieves data when we need it. Without a memory of the past we would be unable to interact or operate in the present or think about the future. Only by using memories and previously learned and stored knowledge can we interact successfully in the world around us. In similar terms, Stark asserts that the formation of beliefs is founded in the *"information gleaned from perception and the defendant's background beliefs"*[487]. However, as Arpaly has pointed out, identifying perception as a form of belief formation is not a

[487] See F. Stark "Culpable Carelessness, Recklessness and Negligence in the Criminal Law" (2016) at p229

straightforward argument[488].

Before action, the agent is aware of the environment he interacts. Where he is, what he is doing, who is around… He has also got a ground of information and knowledge available from his memory. This knowledge is updated in the moment of action with new inputs or stimuli, such as object recognition, during the perception process. Our brain processes all this information and we finally recognize the object or the reality around us. Perception, recognition and action are functionally intertwined with behavioural response. Bearing in mind all this information, the agent decides to act, interacting in the environment around him or withdrawing or delaying his action. It is precisely this latent and updatable knowledge that should trigger in the agent the doubt or suspicion that his action requires him to further increase his knowledge basis. If this is the case, the agent must search for more information or abort his planned action altogether.

The ECCR emphasises the relevance of this updatable knowledge or information to qualify the agent as culpably ignorant (or not). When the information available to the agent, updated with new stimuli, is enough to cast doubts or raise suspicions about his beliefs, he must scrutinise further the situation or stop the action altogether. The agent must use his aptitudes and capabilities to ascertain the truth. If the agent, ignoring or disregarding his suspicion, persists in performing the planned action, his conduct will be inexcusable. However, as it was defended in chapter II, the agent bears a burden, not a duty, to search for more information. Thus, only in the hypothetical case where the information disregarded was sufficient to recognise his mistake and to discern the truth can the agent be held responsible.[489]

We can return to the mistaken red deer hunter case to see how the ECCR works in practice. In a hypothetical *first version* of the case, before shooting, the

[488] N. Arpaly *Unprincipled Virtue: An Inquiry into Moral Agency* (2002) at p53
[489] See chapter 1 and the discussion about the Scottish case *William Roberts v Local Authority of Burgh of Inverness* (1889) 17 R (J) 19

hunter has knowledge about the circumstances around him. He is aware that the gun is loaded. He is conscious that by pulling the trigger the bullet will travel towards the target. He has seen a red deer roaming and grazing behind the bushes. He is not currently aware that behind the bushes there is actually a mushroom forager. Additionally, when he arrived at the forest earlier he saw in the car park some people with wicker baskets with the apparent intention to collect mushrooms. Regardless of all this information, he mistakenly believes that behind the bushes there is a red deer grazing. As a result, he shoots and kills a mushroom forager. In a hypothetical *second version* of the case, the circumstances are identical but without the hunter previously noticing signs of mushroom foragers in the car park.

The current solution, based on the *mens rea* element, would declare the hunter excused in both cases. In both versions of the case the hunter does not have the required *mens rea* for murder. When the agent believes that the object he is shooting at is a red deer and not a human being, he will lack the *mens rea* of murder and the defence of error of fact would be available to him. He would be exculpated because the prosecution would fail to prove the required mental state element of the offence. Discussions could arise about whether or not the hunter had reasonable grounds for his mistake in reference to the *Tolson* versus *Morgan* disparity, but it seems coherent with the current judicial solutions to conclude that in both cases the prosecution will fail to prove the *mens rea* of the hunter. This is because, in fact, the hunter does not have the *mens rea* required for murder according to the subjective principles applied by courts in the context of mistake of fact.[490]

The ECCR works from a different perspective. What is relevant, in terms of excusatory consequences, are the epistemic/cognitive circumstances of the hunter. In both hypotheses the hunter has previous knowledge about what is a red deer and a human being. Indeed, both hunters perceive new inputs during the hunting session, but in the first version of the case the hunter was also aware of other circumstances that surrounded his action, including the presence of mushroom collectors. This additional knowledge is not incriminatory on and of itself, but this existing knowledge

[490] For scholars that have disagree about this subjective perspective see: A. Duff "Answering for Crime" at 294. R. Tur "Subjectivism and Objectivism: Towards Synthesis" in J. Shuttle, A. Gardner and J. Holder (eds) *Action and Value in Criminal Law* (1993) 213. J. Horder "Rethinking Non-Fatal Offecendces against a Person" *LQR* (1990) 106:469

perhaps should be enough to elicit, during the perception process of recognition of the target, the need to update his initial knowledge or abandon the shoot (if the information available raises doubts). The hunter will potentially be culpably ignorant if, from the initial knowledge, it was possible to deduce that in the process of perception before action there may be inferred a doubt that reveals the need to expand this initial knowledge. When the citizen fails to expand his current knowledge or, in any case, fails to delay or stop the action altogether, he will be culpably ignorant. Even so, it could be plausible that neither hunter had doubts about his (false) beliefs. For that reason it looks at least intuitively opportune to introduce some new requirements to fine-tune criminal responsibility in cases where the new stimuli do not raise doubts in the citizen about his false beliefs. This will be the aim of the second requirement of the ECCR developed below.

In conclusion, in those situations where the latent knowledge of the agent, updated with new inputs, produces in the agent suspicions about his beliefs, he must stop the action he is performing. If the agent, ignoring or disregarding this suspicion, persists on performing the action, he will be fully criminally responsible for his behaviour. A *contrario sensu*, this assumption would imply that in those situations where the current knowledge is insufficient to infer the need to search for additional information, the agent should be excused. For those reasons the ECCR introduces a *correction factor* in the second requirement to amend the unfair advantage that the first requisite could raise. Hence, when new information does not raise doubts in a citizen during his perception process, can he still be held culpably ignorant?

b) The standard of awareness expected as status holder

The first requirement of the ECCR presents an obvious problem concerning the standard of awareness required of the agent in relation to the need to update his latent knowledge. The psychological approach of the ECCR's first requirement is subjective and would imply that in those cases where the lazy or indolent agent has done little to ascertain the truth, his action would be non-reproachable. This approach would bring an unfair advantage to the carefree or neglectful agent. However, beyond that, it would conflict with the aim of the criminal law defended in this research of securing the institutional identity of the society. A methodology based only on the

subjective approach of the citizen would detract the confidence that users of a particular institutional structure have if the institution only depends of other users' perceptions. Institutional facts outline a normative model of orientation or guidance in social interactions. This normative model of orientation is essential for an effortless and frictionless interaction between strangers in an atmosphere of mutual interpersonal trust. To foster this environment of mutual confidence, criminal law must in some way protect institutional user's expectations.

The requirements of the ECCR should be consistent with this purpose of the criminal law. As defended in chapter 3, criminal law attains its material legitimation from the need to secure the institutional identity of the society against those actions that contravene the general normative model of guidance in social interaction that the institutional structure defines. Thus, in order to secure the institutional identity of the society, the correction factor introduced in the second requirement of the ECCR should rely on the status holder's perspective. Status is a salient concept in the institutional structure here sustained because its extension (deontic framework) guides both the holder and those who interact with him. Status constructed in this research is built in the terms of the German-British sociologist Dahrendorf who differentiated between position and status–role. The former is the place that an individual occupies in the social structure, whereas status would be the constellation of expectations related to a particular position.[491] Our institutional concept of status rests on the fact that within our modern heterogeneous societies we enjoy *ordered freedom* and our ambit and extension of freedom is precast by social institutions. We must learn how this institutional reality operates before interacting in it. Only within the deontic framework created by this function status can trustworthy social interactions take place.

Status defines prospectively the objective responsibility of the holder in two ways: he is responsible negatively for configuring its ambit of action avoiding causal processes that, creating a non-permitted risk, jeopardise the ambit of action or planning of others or the natural environment (*neminem laede* principle); and positively, the holder is responsible for the deficient performance of any institutional

[491] See chapter 3 for a more detailed exposition

function when interacting with others in the institutional structure.[492] These two demarcations were categorised previously as *inactive* and *proactive* dimensions of status.[493] The inactive dimension involves the planning and performance of our conduct and actions accordingly with the functions inherent to our status without disturbing the planning and organisation of others. The proactive dimension, on the other hand, supposes that the holder, performing the functions assigned by its status, intentionally intervenes in the ambit of planning and action of others. In this relational attribute, the institutional expectation is not the creation of non-permitted risks but that the function status will be performed competently and proficiently. Finally, connected with this double dimension, a new classification of offences was proposed: *offences of disassociation* were defined as those where the status holder does not live up the institutional expectations generated by the inactive dimension of status. On the other hand, modern human societies are also founded in active social interaction and cooperation. Criminal law, securing institutional order, is not only concerned with the assurance of ambits of respect but also with guaranteeing that cooperative institutional functions will be performed efficiently. Vital structures in our contemporary societies like political participation, social cooperation, financial transactions or business trading would not be possible without the securement that their implementation will be done professionally and competently. The proactive dimension of status implies that planning our lives interacting with others is necessary to secure the proficient and orderly development of essential institutions. The status holder has to guarantee the existence of the institution and its continuity. *Offences of association* bring together those criminal offences where the status holder does not live up the institutional expectations generated by the active dimension of status. As a result, it sounds reasonable to require that the corrector factor should reflect this dual perspective in those cases where new inputs did not produce in the agent suspicions about his potential false beliefs.

The standard of knowledge should be different in both kinds of offences because the inactive and active dimensions of status require different levels of social interaction. This dissimilarity substantiates a different standard of awareness between the status holder in disassociation and association offences. Accordingly, instead of

[492] See chapter 3
[493] See chapter 3

advocating a single corrector factor, the proposal defended in this research suggests a dual approach: for offences of disassociation the appraisal will be based on the *collateral institutional user test*; whereas for offences of association the suggested test is similar to a version of the *Bolam* test.[494] Each will be discussed in turn.

The inactive dimension grounded in the *neminem laede* principle substantiates the first category of criminal responsibility and the first principle of trust. The expectation exists that in the exercise of our individual orderly freedom we will take significant choices respecting others. In this inactive dimension the first intuitive standard would probably be that the agent behaves as a reasonable person. Gardner has illustrated how controversial this regularly assumed standard could be.[495] This anthropomorphic legal fiction, inheritor of the Roman *bonus paterfamilias,* represents the body of standards of care shaped by courts through case law. The reasonable person delineates a hypothetical person who exercises average judgement and care. Thus, it could serve as a comparative standard for determining criminal responsibility. However, this comparative standard reflects a majoritarian behavioural approach within a particular society and perhaps does not replicate the expectation that particular users of a particular institutional framework have. For that reason, it seems more acute to articulate a test that encompasses the minimum updatable knowledge required to interact legitimately in the institutional framework: a *collateral institutional user test*. In applying this test, judges and juries must take into consideration the institutional framework where users are interacting. In fact, they should position themselves within the institutional framework. From this perspective, as collateral institutional users, they must decide if the accused has lived up to reciprocal institutional expectations in the particular case under examination. Therefore, in those cases where new inputs do not trigger doubts in the agent's perception process about his beliefs, the applicable test should be an institutional user's standard. It should be decided through this objective/normative appraisal whether the behaviour of the agent falls below the standard of the ordinary user in his situation. Where in the first ECCR's requirement the appraisal was absolutely

[494] The case *Bolam v Friend Hospital Management Committee* (1957) 1 WLR 582 established the typical rules for assessing the appropriate standard of reasonable care in negligence in relation with skilled professionals.

[495] For an extensive discussion about the reasonable person see: J. Gardner 'The Many Faces of the Reasonable Person" *LQR* (2015) 131:1

psychological, taking into account any characteristic of the citizen, the test proposed in the second requirement outlines a normative standard. So, in those offences of dissociation where the citizen disregards suspicions raised during the perception process about beliefs of brute facts, the agent will be criminally responsible. Where he persists on performing the on-going action he will be criminally responsible for the results of his action. Furthermore, when the information available to the citizen (updated with new stimuli) is insufficient to cast doubts or raise suspicions about his beliefs, the citizen will only be exonerated under a normative test. This normative test states that an accused will only be exonerated if the conduct of an ordinary institutional user with similar knowledge and under similar circumstances to the defendant would have had the same (false) belief.

Modern human societies are also founded on active social interaction and cooperation. Vital structures in our contemporary societies like political participation, social cooperation, financial transactions or business trading would not be possible without securement that their implementation is done professionally and competently. The proactive dimension of status implies that in planning our lives interacting with others or the natural environment it is necessary to secure the proficient and orderly development of the essential institutions. We need to trust the engineer who designs our car as much as he needs to trust his dentist. However, the status holder must also guarantee the existence of the institution and its continuity. For that reason, the status holder will be made responsible for a deficient performance of their institutional function(s). As a result of the above arguments, in this research we defend that in the case of *offences of association* the test should be stricter than the collateral institutional user test. Acting in the proactive dimension of status requires more skill and ability than the average institutional user. Consequently, the test applicable in cases where new inputs did not give rise to doubts in the accused about his beliefs should be in line with the standards required for a competent, skilful and proficient user of the institutional structure. However, opinions about a competent and practiced use of the institutional structure can differ. In these cases the issue is again about the standard required. The solution should be in accordance with the function of the criminal law of protecting user's expectations. Thus, it should be enough to show that the decision taken was reasonable in the circumstances, regardless that other users' opinions could differ about the choice. As far as the expectations about the

institutional structure are protected the choice should be admitted as adequate. This approach differs *in tempo* from the test applicable to offences of disassociation: the test for the former type of offences has a descriptive nature; it is about 'what was actually done' and whether or not the standard show was proficient. In disassociation offences the test is normative. It is about what should be done in order to fulfil the standard.

We are now ready to return to the red deer hunter example discussed above. First, we need to determine if we are facing an offence of disassociation or association. The conduct reproached in culpable homicide or murder fits into the inactive dimension of status: to cause the loss of life of another human being when organising our ambit or sphere of behaviour is contrary to the *neminem laede* principle. Murder and culpable homicide are therefore certainly offences of disassociation. In the case revised above, in order to determine whether or not the accused is culpably ignorant we need to go through the first ECCR requirement: if doubts arise during the perception process about his belief and he continues to perform the on-going action he will be held responsible. If doubts did not arise the next step is to apply the corrector factor defined in the second requirement and ascertain if he acted according with his standard as a status holder. In this case, being a disassociation offence, the assessment is whether or not an ordinary institutional user in the circumstances of the accused would act as he did. In the second hypothetical case proposed, where the hunter was not aware of mushrooms foragers in the car park, an ordinary user would probably behave as the hunter did. But in the first hypothetical case it would be sensible to conclude that an ordinary user aware of mushroom foragers in the area would consider the 'absent evidence' and abort their act of hunting. So, in this hypothetical case, the accused would be held culpably ignorant and hence responsible unless his intellectual and physical capacities modified the outcome.

c) *Intellectual and physical capacities*

In some cases, the lack of revision and correction of the latent knowledge is attributable to the agent, but circumstances related to his capacities could exclude his responsibility. The third component of the ECCR refers to the intellectual or physical

capacity of the agent in the moment of action. In specific contexts the agent's perception process could be impaired by external conditions. These objective conditions alter the perception process of the agent affecting his judgement about the need to search for additional information. Alterations in the environment between brute facts and the agent, e.g. light reflections or flashes, or external sounds, could affect the intellectual or physical epistemic capacities of the agent.

On the other hand, personal conditions of the agent can also affect his responsiveness to the reality that surrounds him. Some perceptions can confuse the agent as a result of psychic perturbations, mental health conditions or malfunctions of sensory organs. A person can suffer from visual misperceptions, seizures or even migraines that affect their perception of brute facts. Diplopia (double vision), colour-blindness, hearing voices, drug-induced hallucinations or some types of medication can obviously influence the need to search for more information related to brute facts. The recommended approach defended in this thesis about these impaired capacities more closely resembles the exculpatory consequences provided for intoxication in jurisdictions like Canada[496], New Zealand[497], or South Africa[498] than the inculpatory approach held in Scotland,[499] and in some way in England.[500] Thus, unless the intellectual capacities have been deliberately diminished to weaken the perception process in order to commit a crime, the accused should be exculpated. It is worth pointing out that the legal solution proposed here relates only to situations where the perception process is not affected by circumstances that negate the *mens rea* element.

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[496] See *R v Daviault* [1994] 2 SRC 63 where the Canadian Supreme Court contemplated that intoxication (not induced) could be a defence in crimes of "basic intent". See also s 33.1 of the Canadian Criminal Code which rejects as a defence self-induced intoxication when the accused departs from standard of care established in subsection (2)

[497] New Zealand has discarded the approach taken in *DDP v Majewski* [1977] JC 38 where it established a distinction between offences of 'basic intent' and 'specific intent' and held that in cases of the former, voluntary intoxication cannot form the basis for a defence even if the intoxication produces a state of automatism. See also footnote 56. See *R v Kamipeli* [1975] 2 NZL R610

[498] In *S V Chretien* 1981 (1) S.A. 1097 (A) it was held that intoxication could be considered a defence. The Criminal Law Amendment Act of 1983 s 1(1) creates, in response to the intoxication defence, a new intoxication offence

[499] In Scotland, intoxication has inculpatory rather than exculpatory consequences. See F. Leverick and J. Chalmers *"Criminal Defences and Pleas in Bar of Trial"* (2006) chapter 8

[500] In England, the case *DDP v Majeswski* is the landmark for intoxication. The case divides crimes into offences of 'specific' and 'basic' intent, allowing intoxication as a defence in the former but not the latter

In conclusion, in those situations where an actor's perception process exposes doubts about their beliefs and they fail to expand their initial knowledge and carry on with their action they will be criminally responsible. If no doubts arise during his perception process, the next phase is to evaluate whether the agent behaved in compliance with the awareness required as a status holder. That implies a dissimilar assessment in cases of offences of association and disassociation. If, finally, and according to the test suggested above, he did not act according with his status he will be held criminally responsible unless intellectual or external circumstances can be said to have distorted his perception process.

5.7 The ECCR in crimes of strict liability

It is particularly in strict liability offences where the ECCR introduces more provocative outcomes. Currently, in these types of crimes, even a reasonable false belief is irrelevant. The accused will be convicted even without fault or public interest in doing so. Perhaps it is redundant to point out here that strict liability crimes are an exception to the general rule of liability. The liability is said to be strict because an accused will be condemned even if he had false beliefs about one or more elements that made his action criminal. The strongest argument used to justify these types of offences is probably convenience.[501] Most of the strict liability offences are regulatory offences, so providing financial resources for prosecutions of minor offences that do not involve serious harm might be inefficient. There are also procedural reasons for having them, like the vulnerability of the victim in the courtroom.[502] The proliferation of strict liability/regulatory offences sustain the above arguments. However, serious crimes like statutory rape are considered strict liability offences as well. In any case, a consistent and comprehensive proposal about false beliefs needs to contrast its impact against the current criminal law framework where strict liability offences play a pivotal role.

[501] See A.P. Semester and G.R. Sullivan *Simester and Sullivan's Criminal Law* (2013) at p182

[502] There will be many cases where requiring a child under the age of 13 years to provide evidence about consent would be completely undesirable.

In the most recent comprehensive discussion about error of law/fact: "*Ignorance of law: A philosophical Inquiry*",[503] Husak openly defends "[…] that the mens rea of a criminal offense should be construed to require not only knowledge of the relevant facts but also knowledge of the applicable law".[504] This proposal, which contravenes the historical totemic maxim "*ignorantia iuris neminem excusat"*, is revolutionary to Lord Bridge who states: "… requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable".[505] This approach has been rejected in this research from the beginning. Following that route would have implied devoting the whole thesis to a discussion about the concept and extension of *mens rea* and whether or not it should include cognitive conditions. Instead, this research rests in a segregate study of knowledge, and consequently false beliefs, through the ECCR. For that reason, no proper discussions has taken place in this thesis about the concept, extent or levels of *mens rea*. Nor have we discussed whether the mental element should include volitional elements as well as cognitive ones. Operatively, only two kinds of coherent suggestions can be put forward to solve the problems facing cognitive conditions in a principled way. The first solution would be to implement, in addition to intention (volitional conditions), a cognitive dimension within the mental element of a crime. This is the proposal that Husak, based on the German dogmatic concept of 'dolo malus', defends. The other option would be to implement cognitive conditions outside of the *mens rea* element. This is the argument defended in this thesis.

There are two main reasons to support an autonomous and independent (from *mens rea*) treatment of cognitive conditions: firstly, the enrooted conception existing in common law jurisdictions that knowledge about institutional facts and the relevant law are not part of the mental element. It was examined extensively in chapter I that a consensus exists in the criminal legal scholarship that the mental condition only includes volitional conditions. To attempt to include cognitive conditions within the *mens rea* would be, without a doubt, revolutionary. In fact, it was revolutionary and controversial in the German dogmatic to do so. The fiercer disputes in the German

[503] D. Husak *Ignorance of Law: A philosophical Inquiry* (2016)
[504] Ibd at p2
[505] *Grant v Borg* (1982) 2 All ER 257 at 263

dogmatic have been between defenders of the 'dolo theory' (that proposes a concept of *dolus malus)* and those of the 'culpability (schuld) theory' (who defend a concept of *dolus naturalis).* Thus, to persevere with the inclusion of cognitive conditions within the *mens rea* element, as Husak proposes, would require a solution much more intricate than supporters of this alternative can envisage.

Secondly, to include cognitive conditions in the *mens rea* element would contradict the many thousands of strict liability offences currently in force in the UK. In a legal system without a well-developed administrative law, as in the UK legal field, strict liability offences play a valuable role in the defence and preservation of the institutional normative order. For that reason, in those cases it may be consistent with the ends of the criminal law not to require intention to commit the criminal conduct in order to be convicted. In fact, this is the policy used by the administrative law in continental jurisdictions without any scholarly criticisms. As a result of the pivotal role of strict liability offences this research seeks to evaluate the cognitive condition in addition to and outside of the *mens rea* element. This approach does not contravene the current regulatory framework, so it would be possible to *prima facie* attribute criminal responsibility to an accused without proof of *mens rea (*cognitively-free), and later exclude responsibility because the accused lacks the epistemic conditions necessary for conviction.

It will be instructive to introduce how the ECCR would work in cases of statutory rape (strict liability offence) of a child under 13 years. This was the case in G[506] where a boy of 15 engaged in sexual intercourse with a girl of 12 whom he believed (because she had so informed him) to be 15 years old. As mentioned above, in these cases of statutory rape the false belief that the victim was old enough to have sex is irrelevant[507] and the outcome is always conviction. The result that the application of the ECCR criteria would deliver in this and similar cases would be different from the current solution. Once the volitional elements (*mens rea*) have been proved, an appraisal of the cognitive circumstances should be implemented. Thus, at the first instance, it should be assessed if the information and knowledge gathered during the perception process by G was enough to cast doubts or raise suspicions

[506] (2006) EWCA Crim 821
[507] See Section 5, Sexual Offences Act 2003

about his belief (that the victim was 15). If this was the case, G should be convicted. In case the facts did not raise doubts in G about the victim's age, it should be considered whether an ordinary institutional user (rape being a clear offence of disassociation) in G's circumstances should have inferred that the girl was under 13 years old. If this is the case, and no additional internal or external circumstance diminish G's capacity to update his latent knowledge, G should be convicted of rape. But if an ordinary user in G's circumstances would equally not have had doubts about the victim's age, G should be acquitted. This outcome was reached in the above-mentioned case, *HMA v Daniel Cieslack,* where the High Court in Glasgow took the decision not to sentence and instead discharge absolutely a 19-year-old boy who plead guilty of rape of a girl under the age of 13. The absolute discharge clearly illustrates the potentially unjust outcome of a legal norm that declares criminally responsible an accused even though he is genuinely ignorant of one or more factors that made his action or omission criminal.

The ECCR approach differs and contradicts the rationale defended by Baroness Hale in G: the protection of minors from "[…] the harm, both physical and psychological, which premature sexual activity can do" and the purported reduction of protection that the excusatory effect of false beliefs will produce. It is beyond this research to discuss the good reasons why children aged 12 years old or younger should not engage in sexual intercourse. Beyond moral or good reasons to criminalise underage sexual intercourse, what is relevant is that as a society, this is the institutional deontic framework we expect to be respected from our fellow citizens. Perhaps it sounds impudent to suggest that where mechanical penetration of a penis into another person's body is the pure brute fact, sexual intercourse between two consenting adults is the institutional fact, and thus, as a society we have institutionalized sex. As a result of this, we allow our kids and ourselves to socialise and interact with strangers, because we expect that our fellow citizens will respect this institutional deontic framework. Accordingly, the genuine function of Section 5 of the Sexual Offences Acts is not the protection of minors from "… the harm, both physical and psychological, which premature sexual activity can do" but to protect the expectation we have that the institutional deontic framework will be respected. Indeed, Section 5, as with any other criminal norm, is an exclusionary reason for action. It is a reason that every agent must take into consideration in his deliberation

process before action. When deliberating on whether to have sexual intercourse with someone else, the agent must consider Section 5 as an exclusionary reason not to have sexual intercourse with anyone under 13 years of age. Doing so, the agent entirely fulfils his responsibility as a law follower willing to do what is required.

Hence, Baroness Hale's argument is founded on the premise that the widespread function ascribed to the criminal law is mainly deterrence. This commonly accepted argument rests on the idea that the use of criminal punishment will prevent the convicted or others from committing a criminal offence. However, this rationale is more than questionable. First, because members of the society are possibly motivated not by criminal punishment but by their own convictions. It would be difficult to accept that those not motivated by their personal convictions not to rape would be motivated by criminal punishment. As it was discussed earlier in this thesis,[508] the function of criminal punishment is not deterrence (or retributivism either) but the recognition that the institutional expectations will be maintained even in cases of violation of the deontic institutional framework. It is the reaffirmation that the institutional framework is still valid even in the case of misuse or violation. However, even accepting the deterrence argument, Baroness Hale's rationale that accepting the excusatory consequences of false beliefs will reduce this purported protection could be illogical. It is incoherent because nobody can be deterred by something he is not aware of. Neither the accused in G nor anybody in his circumstances could be psychologically coerced or intimidated by the criminal punishment of underage statutory rape because the accused acts with the personal conviction that he is having lawful sexual intercourse. In cases like G the consideration that the victim is underage is not contemplated in the deliberation process of somebody in his situation. It would therefore appear that a proper evaluation (through the ECCR) of the excusatory effects of false beliefs would be unlikely to undermine the purported deterrence of s5 (or any other criminal norm).

[508] See chapter 3

5.8 Conclusion

The onus is always on those who wish to change a current and valid part of the law both to persuade others that reform is necessary, and to provide a new coherent proposal. I hope that both requirements have been sufficiently reasoned and articulated in the introduction of Part II and this chapter. A feasible differentiation between brute and institutional facts, in the norm definition, has been amply discussed and hopefully in a persuasive manner. Also, the dissimilar perception of both types of facts justifies and supports a different model of attribution of responsibility for false beliefs about brute facts and institutional facts. Finally, the theoretical algorithmic ECCR has passed its first acid test, providing a coherent and fair outcome to false beliefs about brute facts, being respectful to the current scope of the *mens rea* element. So far the proposal to provide a principled fresh approach to false beliefs seems to have survived the first round. It is now time to demonstrate that the ECCR can also provide a principled solution for false beliefs about institutional facts. This will bring a new challenge, as the evaluative appraisal that the perception of institutional facts requires is more prone to catalyse false beliefs about the extension or interpretation of the fact itself. This challenge, and the feasibility of differentiating institutional facts from the institutional command, will be the aims of the next chapter.

CHAPTER 6

FALSE BELIEFS ABOUT INSTITUTIONAL FACTS

6.1 Introduction

The previous chapter introduced the distinction between false beliefs about brute and institutional facts. The initial conclusion was that the perception process is different when considering each kind of fact: instantaneous in the former and evaluative in the latter. Chapter 5 started with a discussion about the differences/similarities between brute and institutional facts. This chapter will examine false beliefs about institutional facts. Section 6.2 will discuss the differences between false beliefs about institutional facts and false beliefs about the institutional command. By doing so, this section will discuss how the evaluative nature that knowledge of institutional facts requires affects false beliefs about them in a very particular manner: where false beliefs about brute facts deal with the *existence* of the fact, false beliefs about institutional facts deal with the *extension* of the fact. Once the difference between both kinds of false beliefs has been discussed and defended, this chapter will apply the ECCR to false beliefs about institutional facts. The first conclusion, as in the case of false beliefs about brute facts, is that criminal responsibility is directly credited when the citizen is aware of the criminality of his action. But the ECCR also provides a deontic solution when the citizen is not cognisant that his action is criminal: he will be responsible if he is *culpable* for his ignorance.

The rest of the chapter will apply the three momentums already presented in the ECCR to false beliefs about institutional facts. According to the first, the citizen will be culpable of his ignorance when his latent knowledge about the extension of an institutional fact triggered a doubt or suspicion that his action could be illegal but he did not abort his action. Three situations, however, can aggravate or alleviate the lack

of suspicion that the action could be criminal: a) when the facts of the case are legally intricate; b) when the state does not discharge its burden to make the description of a criminal offence plainly accessible to citizens; and c) those cases where the state creates or modifies offences previously contemplated as standard without making citizens sufficiently aware of the change. In the second stage of the ECCR, it will be defended that some *normative corrector* element needs to be brought about to protect institutional user's expectations. Accordingly, criminal responsibility would be attributed to the institutional user if the standard of demands according with his status or role has not been fulfilled. When a particular institutional fact is present in potentially illegal conduct and it does not trigger doubts or suspicions about its legality, criminal responsibility will be attributed if the citizen's behaviour fell short of his expected standard as a status holder. Later in the chapter, a dual normative corrector approach will be introduced: for offences of disassociation the appraisal will be based on the *collateral institutional user test*, whereas for offences of association a test in line with a version of the *Bolam* test[509] will be utilised. Both judgements encompass the minimum updatable knowledge required to interact legitimately in the institutional framework. Finally, the third ECCR step evaluates the intellectual or physical capacity of the citizen at the moment of action to determine whether or not they have altered his perception process, affecting his judgement about the need to search for additional information.

6.2 Institutional fact *versus* institutional command

In Chapter 5, it was highlighted that a citizen acts with false beliefs about a *brute fact* when, unknown to him, a component or factor that constitutes a relevant definitional element of a criminal offence, is present in his action. The citizen is not aware that a particular brute fact, which is a relevant part in the offence description, is present in his action. The hunter was unaware that there was a person behind the bushes. His false belief was about the *existence* of the brute fact "person". In these cases, the citizen is wrong about particular circumstances of his action. The hunter was wrong about his target; he thought that it was a red deer when in fact it was a

[509] The case of *Bolam v Friend Hospital Management Committee* [157] 1 WLR 582 established the typical rules for assessing the appropriate standard of reasonable care in negligence in relation to skilled professionals

person. In truth, he did not know what he was doing: if asked *a posteriori* he would assert that he believed that he was shooting a red deer. As mentioned above, this false belief can also be about particular data, like the age of a young girl in cases of statutory rape. In these cases we also see that the citizen has a false belief about a brute fact: that the girl is underage.

Alternatively, or additionally to a false belief about the existence of a brute fact, the citizen can also have a hypothetical *evaluative* misjudgement about a brute fact itself. Instead of being mistaken about the presence of the brute fact in his action, the citizen could be mistaken about the *extension* or the reading of the brute fact. In this hypothetical case, the false belief would be about the genuine material meaning of the brute fact. The citizen would be cognisant that the performance of his particular action includes a brute fact, but he would be mistaken about the scope or extension of the fact. As a result, he would incorrectly deduce that his conduct is not criminal because his action does not match the extension of the brute fact contained in a particular offence. For example, only in situations featuring an exceptional deficit of socialisation could someone believe that an illegal immigrant or an aboriginal are not a person.[510] These kinds of mistakes about the extension of a brute fact would nonetheless be irrelevant in terms of criminal responsibility.

On the other hand, the evaluative judgement that the knowledge of *institutional facts* requires brings a new perspective of perception to the topic of false beliefs. Where mistake about brute facts related to the *existence* of the fact itself in a particular action, relevant mistakes about institutional facts are more prone to be related to the *extension* or interpretation of the fact. In these cases, the citizen is aware about the description of the prescribed conduct. He is also aware that a particular institutional fact is present in his action, but he misinterprets or misconstrues the scope of the institutional fact. The citizen falsely believes that his conduct did not fit the description of the criminal conduct or institutional command.

[510] For example, an interesting case to discuss could be the status of aborigines in Australia before and after the Constitution Alteration (Aboriginals) 1967 Referendum. Before the referendum (and subsequent Act, aboriginals were not included in the census in Australia. Until 1967 they were excluded as objects of law of any act enacted from the Australian parliament, thus they were not in fact, legally speaking, persons.

Normally,[511] the citizen constructs the material meaning of the institutional fact restrictively thus, he falsely believes that his action is not within the scope of the institutional fact present in the description of the criminal conduct.

Remarkably, most of the current cases categorised as mistakes or 'errors of law' by courts or academics are in fact cases of false beliefs about the *extension* of an institutional fact. See, for example, the already mentioned *Smith* case[512] where the accused was a tenant that, with consent of the landlord, installed in the conservatory some electrical wiring and speakers. Once the rental agreement expired the tenant removed this equipment in a reckless manner damaging the equipment that, unknown to him, were now fixtures belonging to the landlord. His false belief was about the extension of the institutional fact 'belonging to another'. He believed that only those things that were in the property at the time of the initial renting agreement belonged to the landlord. Another well-known Supreme Court case, *Morrisette v United States*[513] also fits into this category. In this case, it was explained that the Government established a practice bombing range on a large uninhabited area of Michigan. At various places in the range, used bombing cases were stocked into piles. Morrisette, who was unsuccessfully hunting deer in the area, thought that salvaging some of these casings would be a good way to meet his expenses. He knew that to embezzle, steal or convert property of the United States was punishable by fine and imprisonment.[514] His defence (as he voluntarily, promptly and candidly told the authorities) was that he thought that the property was abandoned, unwanted and considered of no value to the Government. The false belief of *Morrisette* was clearly about the institutional fact concerning property belonging to the United States. Even a false belief about the extension of a custodial order would fit in this group. Take for example the case *People v Flora*[515] where the accused was charged with a felony violation of a foreign child custody order (former Pen.Code, § 278.5, subd. (a)). In this case, the appellant was married with a son. The appellant was physically abusive towards his partner

[511] An expansive construction of the institutional fact could also be possible. In this case the citizen mistakenly believes that his action fits in a definitional institutional fact
[512] *R v Smith* (1974) QB 354
[513] 342 U.S. 246 (1952) 1
[514] 18 U.S.C. § 641
[515] *The People, Plaintiff and Responder v Jess Flora*, Defendant and Appellant No H006977 Decided February 20, 1991

who then left their residence and obtained a temporary custody order for their son from a Washington Court. Thereafter, she took their son to California to visit family and friends. At a later date the appellant abducted his son from California to South America, before the couple finally reconciled and the appellant returned to California where he was arrested for violation of a custodial order. The appellant's defense was that he truly believed that the Washington order was invalid and not enforceable in California. In short, his false belief was not about the institutional command or prohibition; the appellant knew that the violation of a child custody order could be prosecuted as a felony or misdemeanor. His false belief was about the extension of the institutional fact 'foreign child custody order' granted by a Washington Court. He falsely believed that a custody order granted in Washington could not be enforced in California.

This *extensional* perspective pointed out above brings to the categorisation defended in this research a potential confusion: the evaluative perception process required to acknowledge institutional facts is obviously also necessary in the perception of the *institutional command* itself. Awareness about the legal institutional command also requires a similar evaluative judgement. Thus, this extension/evaluative dimension of mistake about institutional facts could put into question the categorical distinction between false beliefs about the institutional facts and false beliefs about the institutional command. If the evaluative perception between both categories is identical, the categorisation loses reliability. This conclusion also raises the question about whether false beliefs about the extension of institutional facts should be solved in the same way as mistakes about the command. In any case, this potential ambiguity or inexactness needs to be discussed and clarified before moving the argument forward.

It has been widely defended here that knowledge of institutional facts requires a standard of understanding of the social framework at an institutional user level. To do so, a rational internalisation or evaluation of the institutional facts are essential. This judgement of value scrutinises the meaning of the institutional concepts in the social institutional interaction. The citizen confronting an institutional fact must evaluate the contingent function socially assigned to the fact, a judgement that requires a process of comprehension associated with the level of socialisation of the

citizen. Furthermore, not all the institutional facts used by the legislative in shaping the framework of a criminal offence have the same level of normativity. Some institutional facts can be understood with a basic cultural or social evaluative judgement (an extra-legal fact).[516] Others, however, require a more legal evaluative judgement. Among this latter group, some are delimited and demarked by the criminal law itself. Additionally, awareness about the scope of the command also requires an evaluative judgement. For that reason, it seems prudent to consider whether or not an analytical difference between awareness about institutional facts and the command itself genuinely exists. Or more accurately, whether the perception process of both concepts is analogous or unrelated. It is only if the perception process is dissimilar that a distinctive categorisation of false beliefs about institutional facts and institutional commands makes sense.

To solve this potential conceptual collision between mistake about the institutional command and mistake about the *extension* of an institutional fact we can start from a purely formal analysis of two dissimilar normative *momentums*: on the one hand, institutional facts are essential elements included by the legislator in the description of criminal offences. Clearly, institutional facts are integrated in the description and shape of the institutional conduct by the lawmaker. This description rules out the illegality and subsequent responsibility of conduct that does not contain the elements required for the unlawfulness of the behaviour, for example destroying or vandalising our own property. Also, conduct can incorporate all the elements required to be criminal but there exists an additional element that makes the action tolerable: permission. To destroy property belonging to another to save the life of a person could be justified. In both cases the user of the institutional framework acts within the limits of a tolerable institutional frame. Thus, according to these arguments even false beliefs about the extension of an institutional fact are part of the definition of the crime.

On the other hand, belonging to a completely different *momentum* are the judgements, appraisals or evaluations that a conduct (previously defined) is or not outside the institutional framework recognised and expected by institutional users,

[516] See chapter 5

that is, that it is criminal. Here, the conduct fell short of institutional users' expectations. Users of the institutional framework do not expect such anomalous conduct. Apparently, this formal scrutiny does not raise conceptual collisions between awareness of institutional facts and awareness about the illegality of the conduct. From a strict, formal perspective, both categories seem coherently and consistently branded without any visible confusion between them. If the citizen has a false belief about the extension of the concept 'own property', for example, it should be categorised as a false mistake about an institutional fact. Another example would be the situation where the citizen ignores that the taking of property they find could be illegal if no reasonable steps are taken to establish whether the property has an owner. This second case involves a mistake about the institutional command.

However, the potential conflict might better be explained in terms of the likely impact that a mistake about the *extension* could have to the citizen's awareness and knowledge about the scope of the institutional command. The conundrum revolves around the fact that some institutional facts are authentic circumstantial proof of illegality or criminality. Thus, a false belief about its extension would blur the categorical distinction between such facts and the institutional command. To flesh out this argument we need to differentiate two epistemic steps in the citizen's perception process before action. In the *first epistemic step*, the citizen, who has some initial knowledge about the factual environment where he interacts, recognises and identifies the elements of the reality that conform to the world around him (top-down processing). Over this prior knowledge the citizen acquires new inputs that he incorporates in his internal deliberation process (bottom-up processing). Thus, the citizen must appropriately identify the facts that shape his action according with his initial normative/institutional knowledge. This identification implies recognising what he is actually doing. The object of this (first) epistemological step revolves around the account or description of conduct that includes brute and institutional facts. On the *second epistemological step,* once awareness of the real facts present in his action are noticed, perceived and recognised, the citizen has to consider in his deliberation process whether, according with his updatable knowledge, the action could be illegal/criminal. This second step implies evaluating whether his future behaviour would be outside the institutional framework expected from other users. In both epistemological steps the citizen can have false believes. If the mistake arose in the

first epistemic step, the false belief would be about a brute or institutional fact. If it arose in the second step, it would be about the institutional command. In both cases, if the latent and updatable knowledge triggers in the citizen the doubt or suspicion that his action requires furthering this basic initial legal knowledge, he must translate his doubts into further investigation. If not, he will be unable to excuse his conduct under a false belief about the law.

An example will clarify this proposal. The legal debate about freedom of choice and privacy of morality behind, for example, the decriminalisation in the 1960s of homosexuality and prostitution (that many assumed had been settled) has recently re-emerged. Last year, the National Crime Agency and Border Force seized 123 child sex dolls that people were trying to import into Britain.[517] The possession or manufacturing of these objects in the UK is not a criminal offence. However, a prohibition on the import of indecent and obscene objects has existed since the Customs Consolidation Act 1876 (CCA). Section 42 of the CCA makes it illegal (although not criminal)[518] to import any obscene print, books, paintings or other indecent or obscene articles. Further, section 170(2) of the Customs and Excise Management Act 1979 (CEMA) criminalises the attempt of evading the prohibition (c) of any provision of the CCA; in this case indecent or obscene articles. According to the Cheshire Constabulary, the first man convicted of an attempt to import a child-like sex doll was recently jailed for two years and eight months.[519] The CCA does not define the institutional facts of "obscene" or "indecent", therefore these extensions of institutional facts are open to interpretation. Recently, Judge Simon James from the Canterbury Crown Court dismissed a claim made by the accused, an ex-primary school governor David Turner, that the child sex doll he imported was not obscene,[520] arguing that "any right-thinking person" would find the doll obscene.[521] On the other hand, lawyers for the accused had argued the doll was not covered by the CCA so the doll could not be considered an obscene or indecent object. Interestingly, Stopso, a

[517] D. Shaw "Child Sex Doll and Obscene Item, Judge Rules" *BBC* (2017)
[518] More about this will be issue will be discussed in the last section of Chapter 7
[519] L. Dearden "Man Sentenced for Importing Childlike Sex Doll from Hong Kong" *The Independent* (2017)
[520] R. Spillet "Former school governor, 72, faces jail after admitting having sex with an 'obscene' life-size child doll as border guards report a surge in the number of the sick robots flooding in from China" *Mail Online* (2017)
[521] D. Shaw "Child Sex Doll and Obscene Item, Judge Rules" *BBC* (2017)

charity that aims to prevent sexual offending through therapy, is calling for the so-called 'child sex dolls' to be made available free on prescription for paedophiles[522].

It would be perfectly realistic to conceive that someone, aware of the prohibition of importing obscene material, falsely believed that a child-like sex doll is not an indecent or obscene item criminalized by the s 170(2) of the CEMA. In fact, this was the argument in David Turner‘s case. In this case, the false belief fits in the first epistemic step described above. The (false) belief should be categorised as a mistake about the *extension* of the institutional fact ‘obscene’. The citizen, aware of the prohibition, falsely believes that a child sex doll is not an indecent object. However, could a false belief about the extension of the institutional fact ‘obscene’ be instead considered a mistake about the institutional command? Well, it could be coherent to defend that the mistaken construction of the extension of the institutional fact ‘obscene’ impedes awareness about the potential criminality of the conduct. But, what the institutional framework defines by the above rules deals with the import of indecent sexual objects or articles. This is what the institutional command forbids in this particular case. Thus, when the citizen falsely believes that a specific prohibition on the import of (indecent or obscene) sexual objects, like those established by the CCA and the CEMA, does not exist his mistake would be categorised as a mistake about the institutional command. Of course, there could be cases where the citizen has a false belief about both the extension of an institutional fact and the institutional command, but even in these cases a categorical distinction would be feasible.

Finally, and before explaining the ECCR in practice, it is relevant to point out a final feature of institutional facts (in contrast with brute facts). Brute facts are value-neutral; they do not suggest or advance the illegality or criminality of the conduct. They are only relevant when the citizen knows the illegality of the conduct. The meaning and evaluative nature of some institutional facts, on the other hand, in some way, identifies and insinuates the potential criminality of the action. They quite often have a value-negative nature. The inclusion in the offence definition of institutional facts like ‘obscene’, ‘indecent’, ‘dishonest’, or ‘belonging to another’ implies some kind of value judgement. They (partially) insinuate or suggest the potential

[522] R. Revesz “Paedophiles 'Could be Prescribed Child Sex Dolls' to Prevent Real Attacks, Says Therapist” *The Independent* (2017)

criminality of the conduct. So, in practice, it is an argument that could blur the distinction between the description of the criminal conduct and awareness of the institutional command. Awareness about the scope of the institutional command perhaps requires a more "inclusive" evaluative judgment. Thus, it could be defended that some institutional facts partially suggest the criminality of the conduct. However, it should be the wide-ranging awareness of the institutional command that provides the citizen with the whole perception of the criminality of the behavior. In conclusion, although a degree of confluence exists between elements forming the two concepts, some differences are also evident and worth emphasising. In any case, all these categorical aspects will have a proper and specific response below when the ECCR is put in practice.

6.3 The Epistemic Condition on Criminal Responsibility in practice: Institutional facts

The category of institutional facts proposed in this research does not exist as such in an academic or judicial environment as it is usually adverse to any strict analytical categorisation. False beliefs about institutional facts are unsystematically treated as mistakes of fact, mistakes about non-criminal law, mistakes about consent, "collateral mistake about non-penal status",[523] etc. and they are *always* dealt through the *mens rea*. In some cases, like *Smith*,[524] discharge of criminal responsibility requires a subjective *mens rea* judgement. On other occasions, like in cases of mistake about consent in sexual offences, the *mens rea* test is strictly objective (honest and reasonable belief). We can therefore conclude that in the academic criminal debate the lack of principled rationalisation of the different issues relating to false beliefs is a common practice. As with the last chapter's approach to brute facts, the rest of this section will attempt to provide a principled and clear approach to false beliefs about institutional facts, applying the ECCR defended in this research:

[523] See *People v Meneses (*Court of Appeal, First District, Division 4, California. No. A113017. Decided: August 19, 2008) where the case *People v Flora (*Defendant and Appellant No H006977 Decided February 20, 1991) was discussed

[524] *R v Smith* [1974] QB 354

"The citizen who performs a criminal action is responsible when, satisfying other conditions for responsibility, he is either aware that the action was criminal or he was culpably ignorant about some feature of the criminal act when he should have noticed it considering:

a) The latent and updatable information available to him.

b) The standard of awareness expected as status holder.

c) That internal or external circumstances do not diminish those individual intellectual and physical capacities required to notice the need to update his latent knowledge."

As discussed above, criminal responsibility is directly credited when the citizen is aware of the criminality of his action. In those situations where the citizen knows that the action he is performing matches the description of a particular criminal offence he is fully responsible. That includes awareness of the institutional command as well as both brute and institutional facts present in his action. In these circumstances, if the mind of a sound, informed citizen nevertheless results in the action he is incontestably responsible for his actions; he is willing to commit a criminal act and he decides to do it welcoming any result from his action at least recklessly. However, as mentioned in the previous chapter, the ECCR also provides a deontic solution when the citizen is not cognisant that his action is criminal. He will be responsible if he is *culpable* of his ignorance. The rest of the section will discuss the criminal responsibility of the citizen who acts with a false belief about an institutional fact.

a) The latent and updatable information available to him

Before action, the citizen is conscious of the environment in which he interacts. This knowledge is updated with new inputs during his perception process. Additionally, he has got a ground of legal/institutional knowledge available from his memory. As we explained above, perception, recognition and action are functionally intertwined with the behavioural response. It is precisely this latent and updatable institutional/legal knowledge that actually trigger in the citizen the doubt or suspicion that his action requires furthering this foundation of knowledge. If this is the case, the

citizen must search for more information or abort his action altogether. This updatable knowledge or information is key to qualifying the citizen as culpably ignorant (or not). When the information available to the citizen, updated with new stimuli, is enough to cast doubts or raise suspicions about his beliefs, he must scrutinise further the situation or refrain from acting. The citizen must use his aptitudes and capabilities to ascertain the truth. If the citizen, ignoring or disregarding his suspicions, persists on performing the planned action, his conduct will be inexcusable. However, as defended in chapter II, the citizen has a burden (and not a duty) to search for more information. Hence, only in the hypothetical case that the institutional/legal information disregarded had been sufficient to recognise his potential mistake and ascertain the truth, the citizen could be held responsible.

Brute facts do not need collective recognition in order to exist. They are present outside of any human institution. Institutional facts, on the other hand, can only exist within an institutional framework. They need the collective recognition of the institutional users to exist. In fact, the attribution of functions to people and objects, that cannot be implemented merely by virtue of their physical structure (outside the institutional framework), are at the essence of institutional facts. This intentional collective recognition informs the material meaning of institutional facts. Thus, the scope of the institutional fact 'indecent', for example, exits insofar as people collectively recognise some behaviours as 'indecent'. It goes without saying that this collective recognition could and is, in some cases, legally defined and delimitated. However, the legal norm will be adequate for (and tolerated within) the particular society only to the extent that the legal norm reflects the scope of collective recognition. What is relevant then, in terms of excusatory consequences, are the epistemic circumstances of the citizen: whether or not his latent knowledge about the existence/extension of an institutional fact have triggered the doubt or suspicion that his action could be illegal.

Although the above guidelines sound straightforward, there are three situations that can influence the levels of suspicion in a citizen that their action might be criminal which require distinctive consideration: a) when the facts of the case are legally intricate; b) when the state does not discharge its burden to make the

description of a criminal offence plainly accessible to citizens; and c) those cases where the state creates or modifies conduct previously contemplated as standard without making citizens properly aware of the changes to this conduct.

a) When the citizen has no apparent doubts about the extension of any institutional fact but the details of the case are legally intricate, the citizen must always consult or search for legal advice about the material meaning of the institutional fact to avoid criminal responsibility. We can scrutinise how this consideration works in practice analyzing the case of *State of Louisiana v Pamela Rabalais*.[525] In this case Pamela Rabalais received a lump-sum payment from a job and used the money to buy a trailer and some land. All the properties, however, were purchased in the name of her partner Jason Rabalais before the couple married. Later, Jason agreed to share ownership of the properties by an act of donation. Pamela accepted the joint ownership of the said properties. However, a year later, when Jason was charged with rape and aggravated battery against Pamela, he signed a "Revocation of power of attorney" that allowed his brother Steve to switch the title of the truck (Chevy S-10) to his name. With a new certificate of title on hand, Steve Rabalais (Jason's brother) went to the Sheriff office and requested assistance in retrieving the truck from the possession of Pamela. After several disputes about the possession of the truck, Pamela removed it from Steve Rabalais' property and was later charged with committing theft. The mistake in this case was treated in relation to what affect it had on the *mens rea*, at both at trial and appeal. She was convicted although her sentence was quashed on appeal. The appeal court decision was based on the fact that the state had failed to prove the element of intent beyond a reasonable doubt: the honest belief that she owned an interest in the truck precluded a finding that she intended to take the property of somebody else (an essential requirement in theft). The issue underlying this case is clearly a false belief about the *extension* of the institutional fact 'belonging to another'. Pamela was aware of the Louisiana Revised Statutes 14:67 that defined theft as the misappropriation or taking of anything of value which belongs to another. According to the courts of appeal of Louisiana, Pamela was finally acquitted simply on the fact that the state had failed to prove the element of intent essential in the crime of theft. No epistemic considerations were taken into

[525] *State of Louisiana v Pam Rabalais*, Defendant-Appellant, No CR 99-623, Decided: January 26, 2000

account by the court.

The ECCR would assess this case from an epistemic perspective. The Court of appeal reasoning that "[…] the honest belief that she owned an interest in the truck" was enough to preclude Pamela's intention to steal property belonging to another is frail. What should be relevant in the case is Pamela's epistemic position. Beyond Pamela's intention, the intricate legal facts involved in this case (a donation followed by a revocation of power of attorney, plus a change in the title of the truck) should have triggered in Pamela the doubt or suspicion that her action could be illegal and, consequently, only if a lawyer or official had advised her about the legality of her action, could she successfully claim that she was under a false belief about an institutional fact. In cases of a complex legal nature the burden is always on the citizen to search for advice, even if the facts do not activate doubts or suspicions about the scope of an institutional fact included in the definition of an offence.

b) The state bears the burden of legislating in a way that the description of any criminal offence is accessible and comprehensible to citizens. We can examine the facts in the case of *People v Marrero*[526] as an example where this burden was probably not discharged. Julio Marrero, a federal correctional officer, was arrested for the unlicensed possession of a pistol in violation of the New York Penal Law § 265.02. The accused falsely believed that, as a federal corrections officer, he could legally carry a loaded weapon without a license based on the express exemption from criminal liability under Penal Law §265.20(a)(1)(a) to "peace officers". According to a press report, he came to this conclusion, he said, after having read several New York penal statutes, and after he had consulted with fellow correction officers, a law professor and a weapons dealer.[527] The statutory definition of "peace officer" was established in CPL 2.10(25) as any correction officer of any state penal correctional facility or of any penal correctional institution. The problem was that Marrero was a *federal* officer when the statute only exempted *state* correction officers. Thus, he concluded erroneously that, as a corrections officer in a Federal prison, he was a "peace officer" and, as such, exempt from the express terms of Penal Law §265.20(a)(1). At trial, the court rejected the defendant's argument that his personal

[526] Court of Appeals of New York 507 N.E. 2d 1068 (1987)
[527] E.R. Shipp "Divided Court Upholds and Old Principle" *The New York Times* (1987)

misunderstanding of the statutory definition of a "peace officer" was enough to excuse him from criminal liability under New York's mistake of law statute (Penal Law §15.20). The court of appeals of the State of New York upheld the conviction.

It is not difficult to share the views of Philip L. Weinstein, Chief of the society's appeals bureau, who proclaimed that the above statute was ambiguous[528] and Marrero's conviction should have been quashed. This statement introduces another special consideration in terms of the information available to the accused: the states obligation to make the law reasonably accessible. Nothing in the facts of *Marrero* proves that he was not a law-abiding citizen. As it was reported, after his doubts about the potential criminality of his behaviour, he asked for legal advice. However, the extension of the institutional fact "peace officer" was contradictory, even confusing. This puts some responsibility on the state in those situations where the knowledge of the citizen is distorted by deficient legislative practices. As Ashworth affirms, "[…] if the law is to serve as a guide to conduct, at least to the extent of allowing citizens to apply their minds so as to avoid becoming subject to the criminal sanction, it should be reasonably accessible".[529] In order to achieve this, the state has the obligation to make its criminal norms clear-cut, certain and prospective. Fuller also makes the same claim when he stresses the importance of making laws available to citizens.[530] This maxim, which derives from the principle of fair warning, was also referred to by Justice Holmes in *McBoule v United States* when asserting that a "[…] fair warning should be given to the world in language that the common world will understand".[531] Norms have to be written in a way that does not confuse (or even ambush) citizens. The wording has to be precise in the description of both brute and institutional facts so that citizens can regulate and adapt their conduct and social expectations to the institutional mandate. This burden of the state should imply that in those situations where a false belief about the extension of an institutional fact is due to an ambiguous definition, the citizen's responsibility should be discharged.[532]

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[528] Ibd
[529] A. Ashworth *Positive Obligations in Criminal Law* (2015) at p20
[530] L. Fuller *The morality of law* (1969)
[531] 283 US 25,27 (1931).
[532] Ambiguity in this context could be a controversial concept. If the standard is set too low, it could make the defence easily accessible for underserving citizens. This research accepts Ashworth's requirement of being *reasonably accessible* as an acceptable standard.

c) Finally, another issue directly associated with the consciousness of institutional facts is legal stability. This feature is stressed by Ashworth when he declares that, as a direct result of the principle of legality, legal norms (especially those of the criminal law) must be clear, *stable* and not retrospective in their operation.[533] It could also be added that legal stability is even more important to common law jurisdictions where the *stare decisis* principle is the cornerstone of the judicial criminal system. Legal stability is interwoven in authorities or precedents. This stability is guaranteed by previous cases that have either a binding or persuasive effect when a court decides about subsequent cases with similar facts. However, although stability, or at least "reasonable stability" as per Allen[534], is an undeniable characteristic of the criminal law, the law is required to embrace, and needs a capacity for, change. Law changes as a result of transformations in the social institutional framework. As Pound in his sociological jurisprudential approach famously claimed, "the law must be stable, but it must not stand still."[535] And this capacity to balance continuity and stability or change and innovation is certainly seen by the legal community as one of the strengths of the common law systems.

Citizens must adapt their behaviour to a stable yet evolutionary institutional framework defined by legal norms. They should act within a framework of what is recognised as a fixed and legitimate institutional and legal standard. Those recognised behaviours are understood as valid and, in any case, citizens do not need to doubt or suspect about their validity before action. Indeed, the burden lies with the state to reassure that any change in what citizens recognise as standard is made well known. And this implies for the state not only to properly publish the new standard, it implies that the state has to use the resources available in a 21st century society to make citizens aware that the institutional and legal framework has changed and the standard expected behaviour has been altered.

As an example of the above argument we can examine the case of *State of Idaho v Milton R. Fox*[536], where on January 1991 the appellant was charged with one count of possession of ephedrine, a controlled substance. In Idaho, ephedrine is listed

[533] A. Ashworth *Positive Obligations in Criminal Law* (2015) at p66
[534] M.J. Allen *Textbook in criminal law* (2017) at 2
[535] R. Pound *ABA Journal* (1958) at p544
[536] No 19778 Supreme Court of Idaho, Idaho falls, April 1993 Dec 28, 1993

as a Schedule II substance in the Uniform Controlled Substances Act 1988. I.C. §37-2707(g)(1)(b), but compounds containing ephedrine could be sold over-the-counter until November 1990, when the Idaho Board of Pharmacy designated ephedrine as a prescription drug. During the trial, the accused tried to introduce as a defence that magazines from out-of-state (and apparently a Magazine from Idaho as well) included advertisements for mail orders like the one he had made. The Uniform Controlled Substance Act states[537] that it is unlawful for any person to possess a controlled substance unless it was obtained directly from a valid prescription. During the hearing, the court held that knowledge that possession of ephedrine was illegal was not an element of the offence. The appeal court highlighted that in this case Fox did not claim that he did not know he possessed ephedrine, rather his claim was that he did not know ephedrine was illegal. Indeed, it was legal two months before he ordered it. In short, Fox asserted a claim of mistake of law rather than a mistake of fact. Accordingly, as a mistake of law was not a valid or recognised defence the court simply affirmed the district's court decision.

Fox's false belief actually concerned the extension of the institutional fact 'controlled substance'. Ephedrine is a drug commonly used for medical purposes. Fox knew very well what the substance was, but he claimed that he did not know it was listed in the statutes as a controlled substance. In fact, it was legally available in other states and available in Idaho two months before his purchase. Furthermore, he ordered the ephedrine by calling the toll-free number of a national outlet. In doing so, he was executing a standard and regular behaviour. However, was the change of the stereotyped behaviour properly published? Unless the State of Idaho made it adequately known to its citizens that ephedrine had become a listed substance, the lack of doubts manifested in Fox should be fairly expected. More about this issue will be analysed later in the next requirement of the ECCR, where the standard of awareness as a status holder will be evaluated. There, this issue of legal stability and standardised behaviour will be considered from the perspective of both types of offences; offences of dissociation and offences of association.

[537] I.C. § 37-2707(c)

b) The standard of awareness expected as a status holder

Fostering and protecting mutual trust between strangers who share the same institutional normative framework is the main function of the law. It has been vigorously defended in this research that to promote mutual confidence among citizens, criminal law must protect institutional user's expectations. Only in this way can frictionless interaction between citizens (civility or social order) take place. But this confidence would be inconsistent if users' expectations depended only on the perceptions of other particular users. Some normative *corrector* element needs to be brought about to consolidate and guarantee trust. Additionally, the account of criminal responsibility proposed must reflect this claim. Criminal responsibility should be attached to our expectation that strangers will behave within the common and recognised deontic institutional framework. Thus, criminal responsibility is attributed to the institutional user if the standard of demands according with his status or role has not been fulfilled. Therefore, when a particular institutional fact is present in potentially illegal conduct and it does not trigger doubts or suspicions about its legality, criminal responsibility will be attributed if the citizen's behaviour fell short of his expected standard as a status holder.

It was previously claimed that status defines prospectively the objective responsibility of the holder both negatively and positively. In accordance with the former, he is responsible for configuring his ambit of action avoiding causal processes that jeopardise the ambit of action or planning of others (*neminem laede* principle). Likewise, and for the latter, the holder is responsible for the deficient performance of any institutional function when interacting with others in the institutional structure.[538] These two demarcations were categorised previously as an *inactive* and *proactive* dimension of status.[539] Finally, connected with this double dimension, a new classification of offences was proposed: *offences of disassociation* when the status holder does not live up the institutional expectations generated by the inactive dimension of status, and *offences of association* when the status holder does not live up the institutional expectations generated by the proactive dimension of status.

[538] See chapter 3
[539] See chapter 3

In the previous chapter it was stated that instead of advocating for a single *corrector* factor, the proposal defended in this research suggests a dual approach: for offences of disassociation the appraisal is based on the *collateral institutional user test*, where for offences of association the suggestion is one which takes inspiration from the *Bolam* test.[540] Both tests have been explained in the previous chapter and it would be redundant to explain it here again. However, a review of different cases will illustrate how the standard of awareness as status holder contemplated in the ECCR could achieve different (but principled) outcomes over the current solution based on the *mens rea* element modified by a mixture of inconsistent and unprincipled criteria.

To illustrate how awareness as a status holder touches on criminal responsibility we can scrutinise the case of *People v Meneses*.[541] an interesting case where the Court of Appeal also deliberated about several other cases of potential ormative and/or factual mistake (for example: *People v Flora*). In the case, a jury convicted Rolando Meneses of, among other crimes, stealing public records in contravention of Gov. code 6200. Later, the Court of appeal of California confirmed the judgment. The accused admitted that he operated a lawyer referral business in which law firms and chiropractors would pay him a fee for introducing injured people for services. Initially Meneses used information from inside a hospital but later he obtained traffic collisions reports from the San Francisco Police Department. The reports were sold to him by someone who got the reports from a clerk-typist at the police department. At trial, Meneses testified that he used the reports to contact the innocent party in the accident and suggest that they contact a chiropractor and a lawyer, as well as to claim insurance compensation. He added that accident reports are public records that anybody is entitled to access to, asserting that he used to obtain police records when he was working in a lawyer's office. Meneses' defence contains three relevant facts for our purposes: he described himself as a salesman; he had obtained a business licence for his business; and he operated under the name of Legal Network Services.

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[540] The case of *Bolam v Friend Hospital Management Committee* [157] 1 WLR 582 established the typical rules for assessing the appropriate standard of reasonable care and negligence in relation to skilled professionals.

[541] Court of Appeal, First District, Division 4, California. No. A113017. Decided: August 19, 2008

On appeal the accused claimed that the trial court had a duty to instruct the jury on mistakes of law and fact "*sua sponte*". The Appeal Court rejected this claim, stating that mistake of law is rarely a defence and the court duty to instruct *sua ponte* arises only where the accused relies on such a defence, circumstances not satisfied by the accused. The court acknowledged the difficult distinction to be drawn between mistakes of fact and law, especially when the accused has a false belief about a legal status or rights as in the case of *People v Flora*.[542] In *Flora*, the Court considered if the false belief that a foreign child custody order was unenforceable in another state[543] was a mistake of fact or law. Opening the door to a hypothetical defence in the case, the court recognised that "[…] Arguably, the claim could be understood as a mistake of fact defense-defendant claimed he was mistaken about the fact of the legal status of the custody order, not the existence of a law requiring compliance with court orders"[544]. In the next line, the court considered that it could also be a collateral mistake about a non-legal status of police records, in short a mistake of law.[545] In any case, both Courts of Appeal supported the decision upheld at first instance without any appraisal of the accused's knowledge requirements. In *Flora,* the court's argument was that the appellant's conduct was not indicative of good faith. Acting as a fugitive, the appellant only succeeded to demonstrate his consciousness of gilt. The reason behind the outcome in *Meneses* was an evidential one; the lack of reliance on the purported defence at first instance proved fatal to his appeal. Hence, although at a glance the issue in both cases was an epistemic one – whether or not the respective accused were aware of the extension of the institutional facts 'police report' and 'custodial order' – remarkably both trial courts and both Courts of appeal disregarded any epistemic aspect in their consideration.

The ECCR evaluates specifically the epistemic conditions of the accused. In the above cases, the accused claimed that he was not aware of the illegality of his action due to a false belief about what would fit in the definition of an institutional fact. Both claimed that they were mistaken about the extension of the concepts 'police report' and 'custodial order'. According to the ECCR, to determine whether or not the

[542] In this case the court constructed the claim as a mistake of law defence, which was later rejected. However, the claim could be constructed as a mistake of fact about the status of a custody order
[543] See *People v Flora*
[544] See *People v flora* discussion about mistake of law
[545] See *People v Meneses* discussion about "General principles of mistake of law and mistake of fact"

accused were culpably ignorant we need to evaluate if their initial knowledge as status holders should have triggered the doubt about the legality of their respective actions. As the standard test for offences of association and disassociation is different, we must first decide which type of offence has been committed. Meneses was accused of stealing public records through his licensed business. He was acting within the proactive dimension of the status as a salesman, so he can be said to have committed an *offence of association*. Flora, on the other hand, was accused of a felony violation of a foreign child custody order. In committing this offence the accused failed to live up to the institutional expectations generated by his inactive dimension of status. Although Flora has the status of father, a fact which could lead us to interpret the case with a potential proactive dimension, the provision does not stipulate that only fathers can commit the felony.[546] Thus, the felony Flora was accused can be categorised as an *offence of disassociation.*

Now we can review the facts in *Meneses* to determine the outcome of the case that the ECCR's requirements would deliver. In this case the appellant claimed a false belief about the extension of the institutional fact 'public records' included in the description of the offence of stealing public records.[547] He admitted that police accident records are a public record because everybody could get them. However, he also believed that police accident records were open to the public and could lawfully be purchased. For those reasons, he believed that police accident records did not fall within the concept of 'public record' criminalised by the criminal code. According to the criteria of the ECCR, Meneses was not aware that his action was criminal, therefore, criminal responsibility cannot be attributed unless he is culpable for the ignorance from which he acts. The accused claimed that he "did not think he did anything wrong",[548] thus it can be inferred that the knowledge he had before acting did not trigger any doubts about the criminality of his action. However, should Meneses have been aware that buying police accident records fits within the institutional fact of 'public records' criminalised by the code? More specifically,

[546] Section 278.5 provides: "(a) Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars.

[547] Gov. code 6200.

[548] See *People v Meneses*

should the accused have been aware of this fact, considering he was performing a commercial activity holding the status of a businessman in this sector, as he testified? We are evaluating an offence of association therefore, where the accused had represented himself as having more knowledge or expertise (businessman) than the average citizen, it is expected that the standard must be in accordance with a responsible body of opinion, even if others would diverge on the opinion. In short, if Meneses had acted within the acceptable standard of a responsible body of businessmen (if any) undertaking this kind of activity, he should be acquitted. It could be presumed that the practice of any responsible body of lawyers or chiropractic referral businesses would require their members to know the legality surrounding their practice and, specifically, to ascertain if the sources of information they are using have a lawful origin. Thus, if the argument behind the refusal of Meneses' defence of mistake of law by the court of appeal was evidential (the lack of reliance on the purported defence) our proposal would determine that after assessing the epistemic circumstances of the case the ECCR has been satisfied. As a result, Meneses' claim of false belief about the extension of the institutional fact 'public record' should have been declined.

On the other hand, *People v Flora* (the other relevant case discussed by the court in the Meneses's ruling) was, as highlighted above, an offence of disassociation. As a result, the appropriate test here proposed in the ECCR is the *collateral institutional user test.* The test encompasses the minimum updatable knowledge required to interact legitimately in the institutional framework. If we review the facts in *Flora*, the accused who was charged with a violation of a child custodial order claimed that he thought that a custody order granted in Washington was unenforceable in California. Thus, his false belief was about the extension of the institutional fact 'child custody order'. In fact, during their deliberations at trial, the jury required the court to answer the question: "[…] Is the restraining order issued in the State of Washington, Clark County, dated 21 December 1988, valid in the State of California, County of Santa Clara?" The court responded to the question in the positive, supporting its ruling in the Civil Code section 5162,[549] the United States

[549] "The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this title or which was made under factual circumstances meeting the

Constitution and the Uniform Child Custody Jurisdiction Act to which both California and Washington are signatories. Thus, it is relevant to note that even the jury was not fully aware of the enforceability or validity of the Washington order in California. As a result, we could infer that the accused, according with his knowledge, similarly had no motives or reasons to doubt the potential criminality of his conduct. Thus, only if he was culpable of the ignorance from which he acted could criminal responsibility be attributed to his action.

It is here where the ECCR *collateral institutional user test* makes a difference utilising the standard 'reasonable person test'. If we were to apply this test, the fact that even the jury was unsure about the enforceability of the custodial order in California might make us infer that Flora should be excused. If the members of the jury acting as an ordinary person with an average level of awareness were unaware of the enforceability of the custodial order, it could be presumed that a higher standard of awareness should not be demanded from Flora. According with this appraisal, the judge or jury must disregard the standard reasonable man test for a more institutional user orientated judgement. Thus, they must take into consideration the institutional framework where the users are interacting. In fact, they should position themselves within the institutional framework. From this perspective, as collateral institutional users, they must decide if the accused has lived up to reciprocal institutional expectations in this particular instance.

In our modern societies we have demarcated an institutional framework that structures the rights and privileges that underpin the interactions between a child and either of the child's parents or adults with significant roles in the child's life. This framework is usually referred to as Parental Responsibilities (PR) and includes matters of contact (or visitation in the US) and residence. It is only when the expectations of other users within the institutional framework (like the custodial parent or the child themselves) are guaranteed that interrelations and relationships are frictionless. This essential, smooth relationship between users of the institutional framework can only be achieved when everyone's expectations are protected. This

jurisdictional standards of the title, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this title" Calif. Civil Code s 5162.

implies that any institutional user should be aware of the extension and content of the Parental Responsibilities framework. In this way, the parent who holds residence rights, for example, will not impede the parent with contact rights from exercising that right, and vice versa. It is worth highlighting that the appeal in *Flora* was based on the false belief that a foreign child custody order could not be enforced in a different state. Regardless, the *collateral institutional user test* requires the members of the jury or judges to evaluate the potential false belief of the accused, taking into account the reciprocal expectations that operate within the institutional frame's demands. That is, they must consider what the minimum updatable knowledge required is to lawfully interact in the institutional framework. By doing so, they will establish the minimum threshold that will decide the potential culpable ignorance of the citizen. Taking these arguments into account, perhaps, it would not be difficult to support the idea that any user of this institutional framework could expect that the violation of a child custody order in a particular state could be recognised as a felony in a different state. Therefore, although the application of the reasonable test in this case could hypothetically lead to a successful defence of false beliefs about an institutional fact, the collateral institutional test would attain the opposite outcome.

c) *Intellectual and physical capacities.*

Finally, as it was explained in reference to mistakes about brute facts, the last component in the ECRR test relates to those specific capacities or circumstances that could exclude responsibility. This third step appraises the intellectual or physical capacity of the citizen at the moment of action. In specific contexts the citizen's perception process could be impaired by external conditions. These objective conditions could alter the perception process of the citizen, affecting his judgement about the need to search for additional information. These personal conditions of the citizen can also affect his responsiveness to the reality that surrounds him. Some perceptions can confuse the citizen as a result of psychic perturbations, mental health conditions or malfunctions of the sensory organs. A person can suffer from visual misperceptions, seizures or even migraines that affect the extension of an institutional fact. Diplopia (double vision), colour-blindness, hearing voices, drug-induced hallucinations or some type of medications can obviously condition the need to search for more information related to institutional facts.

In conclusion, in those situations where the perception process of a citizen exposes doubts about their beliefs and the citizen fails to adequately expand his initial knowledge, continuing with the action he will be criminally responsible. This psychological appraisal does not imply that the accused is completely exonerated of the consequences of his action. If no doubts arise during his perception process, the next phase is to evaluate whether the citizen behaved in compliance with the awareness required as a status holder. That implies a dissimilar assessment in cases of offences of association and disassociation. If, finally, and according with the test suggested above, he did not act according with his status, he will be held criminally responsible unless intellectual or external circumstances can be said to have distorted his perception process.

6.4 Conclusion

Providing a fresh coherent legal proposal is not an easy undertaking. The prospect (or risk) of introducing contradictory or conflicting arguments is always present. Previous chapters contended that our perception of brute and institutional facts is dissimilar. This chapter introduced the idea that false beliefs about brute facts usually concerns the *existence* of the fact, whereas false beliefs about institutional facts are concerned with the *extension* of the fact. However, false beliefs about the institutional command also require a similar evaluative judgement. Thus, the natural conclusion of this extension/evaluative dimension introduced has the potential to jeopardise the categorical distinction between false beliefs about institutional facts and those about the institutional command proposed. This has chapter has hopefully clarified this potential incoherence enough to avoid contradictory or overlapping arguments.

After the categorisation of false beliefs about institutional facts was sufficiently defended, this chapter applied the ECCR in similar terms to its application to false belief about brute facts in the previous chapter. However, three objective circumstances that could affect the outcomes of the ECCR were identified. The first set ups a duty on citizens and the other two create duties on the state. The citizens' duty to search for legal advice in intricate cases has little significance beyond false

beliefs. However, those that recognise duties on the state have huge legal transcendence. Supporting the idea that the state has a duty to make the law accessible to citizens by legislating in an unambiguous way (especially when changes to stereotyped behaviour are introduced), implies an open recognition that the aim of the criminal law is to guide citizens. It recognises that criminal norms are conditions taken into consideration in deliberation, implicitly recognising as well that others will behave according to the expectation they have that criminal norms will be followed. These are admittedly assumptions that not every reader of this thesis will likely support.

CHAPTER 7

FALSE BELIEFS ABOUT THE INSTITUTIONAL COMMAND

7.1 Introduction

A false belief about the institutional command or prohibition arises when a citizen, aware of all the factual elements of a criminal norm (both brute and institutional), ignores that the conduct has been prohibited by the criminal law. The last two chapters have attempted to frame the extension of brute and institutional facts used by lawmakers to define the prohibited, permitted or commanded conduct. This chapter will discuss those excusatory situations where the citizen has the false belief that his conduct *does not* infringe or transgress a recognised institutional framework. We shall first discuss the epistemic requirement demanded of the citizen who has potentially infringed a particular institutional framework. Thus, we must determine what kind of (standard) knowledge is required to determine that the citizen acts with full awareness of the recognised institutional framework. In other words, what level of knowledge is necessary to demand from a citizen in order to disregard the excusatory significance of a false belief about an institutional command or prohibition. Three forms of awareness will be discussed here: knowledge about the immorality of the conduct; knowledge only that the conduct is illegal; and a more specific understanding that the conduct is criminal. Later in the chapter, the ECCR will again be put in practice in cases of false belief about the command or prohibition. The application of the ECCR to false beliefs about the command or prohibition, and the evaluative judgement required, is analogous to false beliefs about institutional facts discussed in the previous chapter. Criminal responsibility will be attributed when the citizen knew, or his latent knowledge (according with his role as a status holder) have triggered the suspicion, that his conduct could be criminal.

The chapter will conclude with the discussion of a general topic that applies to any type of false belief revised in previous chapters. The ECCR established that in those cases where the citizen has suspicions about the criminality of his action, he ought to reflect or seek advice or abort his action altogether.[550] However, we have yet to consider the measures the citizen must take in order to discover the truth, or, more importantly, the quality of the information that could exonerate him (even if he is later proved wrong), or when the duty to corroborate the information received begins or ends. Thus, the aim of this chapter is *to determine the point of inflection where the burden of seeking advice about the law becomes a right to rely on a trustworthy source.*

7.2 Knowledge that precludes exculpatory consequences to false beliefs

The previous chapter defended excusatory consequences for false beliefs under specific circumstances. In fact, the first precept of the ECCR reaffirms that responsibility be attributed when the citizen was aware that his action was criminal. However, what does it mean to be aware that an action is criminal? What kind of knowledge is required? Is awareness about the immorality of the conduct sufficient to conclude that the citizen knew the action was criminal? Or must the citizen also be aware about the illegality of the conduct? The extension of this precept will be discussed in this section. We shall then examine if, in order to be aware that their conduct is criminal, a citizen requires: a) knowledge that the conduct was morally wrong; b) knowledge of the illegality of the conduct; or c) awareness that the conduct was explicitly criminal. The direct consequence of the outcome of this discussion would be that those citizens who know that their action is criminal would be unable to claim any excusatory effects from their false belief, precisely because the ECCR establishes that the citizen is fully responsible when he is aware that his action is criminal.

[550] These questions are more pertinent in cases of false beliefs about institutional facts or about the institutional command or prohibition, than in those of brute facts. Brute fact, by their nature, do not usually require the citizen to search for information about them from third parties.

The legal moralist tradition understands criminal law as a subspecies of moral theory focused on moral wrongs or different levels of wrongdoing rather than on legal norms. According to this approach, what the criminal law must demand from citizens is to abide by the law not because it is legally valid but because the conduct is morally wrong. The concept of wrong becomes essential to both the process of criminalisation and the function of the criminal law itself. In this context criminal norms have the subordinate purpose to declare the wrongfulness of the prohibited conduct, and the purpose of the criminal law is to achieve retributive justice by punishing those who are morally culpable in the doing of some wrongful action. These arguments flow from Bishop's verdict that the "law was written in our hearts",[551] to the version of 'public wrong' expressing community sentiment as defended by Duff, through to the idea defended by Devlin that "crimes are sins with legal definitions".[552] From this moralistic tradition, the mere awareness that the conduct could be harmful, immoral or wrong would be sufficient to rule out any excusatory effects of false beliefs. Those citizens aware of the immorality or wrongful nature of their action are precluded from claiming any excusatory effect for a false belief about the institutional command or prohibition.

On the other hand, for those of the legal positivist perspective knowledge of legal validity and its relevance in our practical reasoning before action is salient. The law is not "written in our hearts". The guidance view, as it has been referred to in this paper,[553] is an ability of the law to rise above merit-based discussions and guide citizens *ex ante*. Any legal system must have cognoscible rules of action for guiding conduct.[554] This forward-looking guidance for ordinary people was highlighted by Hart when he states that "law […]be concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is".[555] Finally, Joseph Raz' position in his recognised theory of rules as "exclusionary reasons" [556] summarises the legal positivist approach towards this issue: mere awareness about the illegality of the conduct should be enough to rule out any

[551] See chapter 2.
[552] P. Devlin *The enforcements of morals* (1965) p27
[553] See JoJ.P. Bishop *Commentaries on the Criminal Law* (1858) at Chapter 2
[554] J.P. Shofield and J. Harris (eds) *The Collected Works of Jeremy Bentham. Legislator of the World: Writings on Codification, Law and Education* (1998)
[555] H.L.A. Hart *The Concept of Law* (1994) at p39
[556] J. Raz *Practical Reasons and Norms* (1975)

potential excusatory effect of a false belief. Knowledge that the conduct is illegal should be enough reason for the citizen to avoid it.

In this research a third and different perspective towards this issue has been proposed and defended. The thesis recognises the persuasiveness of the legal positivism standpoint, particularly in the exclusionary motivational[557] effect of a general prohibition. However, it is insufficient to state that plain awareness about a general prohibition precludes excusatory effects of false beliefs: only the citizen's awareness about the *criminality* of his conduct could preclude a potential excusatory effect of a false belief. Without a doubt, knowledge that the conduct is immoral or illegal could be an indication or warning that the conduct could be criminal, but the levels of motivation of a citizen are higher (even different) when the institutional framework is criminalised. The attachment of criminal punishment to the criminalised conduct brings a different perspective to state intervention. Criminal courts and procedures are involved which provides a higher degree of incentive to act within the institutional framework. Also, and in terms of protection of other citizen's institutional expectations, criminalisation has a higher level of reassurance that the institutional framework will be respected, fostering trust between strangers and social order.

The child-like sex dolls example discussed in the previous chapter provides a good illustration to elucidate the above argument.[558] As we saw, s42 of the CCA made it illegal to import any obscene prints, books, paintings or other indecent or obscene articles. This general prohibition was later criminalised by section 170(2) of the CEMA. At first instance it seems obvious that the potentially immoral nature of importing "obscene" or "indecent" material should be irrelevant to the epistemic citizen's attitude before action. Indeed, even the basic awareness that the conduct is illegal should not prevent the excusatory consequences of a false belief. Precisely for that reason, the lawmaker specifically criminalised such conduct under s170(2) of the CEMA. This is because criminalisation adds a higher level of motivation to act within

[557] See chapter 2
[558] See chapter 6

the institutional framework. It also reassures other potential users that the recognised framework would be protected even in cases of its violation.[559]

In contrast to the problem exposed above, the ECCR emphasises precisely in its wording that only when the citizen was aware that his conduct was criminal can any excusatory effect be precluded. The ECCR literally states that *"The citizen who performs a criminal action is responsible when, satisfying other conditions for responsibility, he is either aware* ***that the action was criminal*** *or he was culpably ignorant about some feature of the criminal act when he should have noticed it […]*." Accordingly, in those situations where the citizen was merely conscious about the immorality or mere illegality of his conduct it cannot be directly assumed that the citizen acts with awareness of the institutional command or prohibition.

7.3 The Epistemic Condition of Criminal Responsibility in practice: False beliefs about the command or prohibition.

This section of the chapter will attempt to provide a principled approach to those situations where the citizen, although aware of all the factual elements of a criminal norm (both brute and institutional), ignores or is misled about the negative institutional appraisal and consequent prohibition of his conduct. The recent cases *R v Thomas*[560] and *R v Beard*[561] provide examples of false or mistaken beliefs about a prohibition. In the former case the accused admitted having sexual intercourse with a girl of 17 who had previously been under his foster care. The sexual activity only took place once she had left the foster family. The accused was convicted of sexual activity with a child family member contrary to s25 of the Sexual Offences Act 2003. The accused was unaware that his conduct was criminal. The two relevant considerations of this offence for our purposes are: first, that it applies where the child is under 18[562] (when the normal age of consent to sexual intercourse is 16 years); and second, that according to s27 of the 2003 Act it can be committed by a person who is or has been the foster carer of the child.

[559] A different issue is *whether or not* the importation of childlike sex dolls should be criminalised at all
[560] [2006] 1 Cr App R (S) 602
[561] [2008] 2 Cr App R (S) 32
[562] s25(1)(e)(i) Sexual Offences Act 2003

In *Beard*, the police found 78 tear gas canisters, 66 of which were prohibited under s5 of the Firearms Act 1968, during a search of the appellant's residential caravan. The appellant expressed remorse, claiming that the offence had been committed unknowingly and had resulted from carelessness and ignorance. He claimed not to have knowledge of the ammunition. He also indicated that he was not aware that the possession of the canister was criminal and testified that the cartridges had been left several years ago by a friend. He was also functionally illiterate and could not read the label that, although mainly in German, indicated in English that they contained tear gas. His false belief was not about the extension of an institutional fact used in the description of a crime,[563] nor was it a mistake about a brute fact. In both *Beard* and *Thomas*, the accused had a false belief about the criminality of their behaviour: they were not aware that their conduct contravened the institutional prohibition established in the pertinent criminal norm.

This chapter started with a discussion about the required standard of knowledge to rule out the excusatory effects of a false belief. It was concluded that mere awareness that the conduct is immoral or illegal does not automatically imply knowledge of the command or prohibition. We must therefore determine when or under which circumstances a citizen who acts under a false belief about a command (or prohibition), or is completely ignorant of the command, can be excused by means of the ECCR:

"The citizen who performs a criminal action is responsible when, satisfying other conditions for responsibility, he is either aware that the action was criminal or he was culpably ignorant about some feature of the criminal act when he should have noticed it considering:

a) The latent and updatable information available to him.

b) The standard of awareness expected as status holder.

c) That internal or external circumstances do not diminish those individual intellectual and physical capacities required to notice the need to update his latent knowledge."

[563] The section is clear about the prohibition of such canisters

a) The latent and updatable knowledge

The evaluative judgement that the knowledge of institutional facts requires makes the application of the ECCR to false beliefs about the command or prohibition quite similar to false beliefs about institutional facts, as discussed in the previous chapter. As in those cases, criminal responsibility is straightforwardly attributed when the citizen is aware of the criminality of his action and has the requisite intention (*mens rea*) to perform it. As it was mentioned in the previous chapter, the ECCR also provides a deontic solution when the citizen is *culpable* for his ignorance. As with false beliefs about institutional facts, the key element to assess is the initial knowledge that the citizen has about the command or prohibition. This latent and updatable institutional/legal knowledge triggers in the citizen the doubt or suspicion that his action requires furthering this knowledge. If this is the case, the citizen must reflect, search for advice, or abort his action altogether. If the information available to the citizen was enough to cast doubts or raise suspicions about his beliefs, he must scrutinise further the situation or refrain from acting. When the citizen, ignoring or disregarding his suspicion, persists on performing the planned action, his conduct will be inexcusable. Thus, what is relevant in terms of excusatory consequences are the epistemic circumstances of the citizen: whether or not his latent knowledge about the command or prohibition should have triggered the doubt or suspicion that his action could be illegal. This was apparently the situation in the *Thomas* and *Beard* cases. It would be difficult, for example, for the accused in *Thomas* to claim that he did not know that the law of sexual offences prohibits familiar sex or incest. However, it would not be ridiculous to assume (it might even be *a priori* reasonable) that he had no doubts about the criminality of his action in circumstances where the sexual relations took place with: a) a former foster child who is b) over the age of sexual consent. The same conclusion could be reached in *Beard* where the accused indicated that he was not aware that the possession of the canisters was criminal and testified that the cartridges had been left several years ago by a friend.

The three situations, discussed in the previous chapter, which can disturb

the lack of suspicion that the action could be criminal, also affect or apply to false beliefs about the command. When the citizen has no doubts about the criminality of his action but the facts of the case are legally intricate, the citizen must always consult or search for legal advice. In cases of a complex legal nature the citizen always bears the burden of searching for advice. As a law-abiding citizen who is willing to do what is required, he bears the burden to ascertain the legal quality of his action, even if *prima facie* the facts do not create doubts or suspicions about the criminality of his action.

In the same way, the burden that the state has to legislate in a way that makes criminal offences accessible and comprehensible to citizens affects false beliefs about the command. Statutes and other sources that set out the criminal law need to be explicit and unambiguous. Legal norms must be written in a language that the common world will understand and in a way that does not confuse citizens. This burden implies that in those situations where a false belief about the prohibition is due to ambiguous drafting, the citizen's responsibility should be relieved. Finally, another issue directly associated with the knowledge of the prohibition or command is legal stability. Legal norms in general, but criminal norms in particular, must be clear, reasonable and not retrospective in their operation,[564] permitting citizens to adapt their behaviour to a stable but evolutionary institutional framework. This reasonable stability is even more critical when the framework of a particular stereotyped conduct becomes criminalised. Citizens should not need to doubt or suspect validly recognised, socially stereotypical conduct. Otherwise the flow of interaction within institutional frameworks would be disrupted. However, this argument shifts the burden to the state in the case of new legislation. Thus, in those cases where previously lawful stereotyped conduct is criminalised and the state fails to discharge its obligation to properly publicise the changes, the citizen's responsibility should be only partial. The same mitigating solution should be established for those cases where the information about the new offence has not been properly circulated between the potential users of the institutional framework.

[564] A Ashworth *Positive Obligations in Criminal Law* (2015) at p66

b) The standard of awareness as status holder

In the same way, the normative *corrector* element introduced to reinforce the interpersonal trust present in institutional or brute facts is effective here. Criminal responsibility should attach to our expectation that strangers will behave within the common and recognised deontic institutional framework. In other words, criminal responsibility should be attributed to the institutional user if the acceptable standard of demands, according with his role, has not been fulfilled. Thus, when embarking on potentially illegal action, if the citizen's conduct does not trigger doubts or suspicions about its legality, criminal responsibility will be attributed if the citizen's behaviour fell short of his expected standard of behaviour as a status holder. The dual approach defended in cases of false beliefs about institutional facts also holds here: for offences of disassociation the evaluation will be based on the *collateral institutional user test*, whereas for offences of association a version of the *Bolam* test[565] will be used.

The ECCR specifically evaluates the epistemic conditions of the accused. For example, in the two cases discussed above the accused claimed that they were unaware of the criminality of their actions. Both claimed that they had no suspicions about the criminality of their behaviour. Thus, to determine whether the accused was culpably ignorant or not we should evaluate if his initial knowledge as a status holder should have triggered doubts about the legality of the action. To do so, we need first to identify if we are evaluating a disassociation or association offence. *Thomas* was accused of an offence of sexual activity with a child family member contrary to s25 of the Sexual Offences Act 2003. He was acting within the proactive dimension of the role of a (former) foster carer, thus his conduct amounts to an *offence of association*. On the other hand, *Beard* was accused of possession of a weapon subject to the general prohibition under s5 of the Firearms Act 1968. Committing this offence implies that the accused has not lived up to the institutional expectations generated by his inactive dimension of status. Beard's offence should therefore be categorised as an *offence of disassociation.*

[565] The case *Bolam v Friend Hospital Management Committee* established the typical rules for assessing the appropriate standard of reasonable care in negligence in relation with skilled professionals

The requirements for being a foster carer extend beyond just having a spare room in your house. You need to demonstrate strong family relationships within your own family to provide a stable environment for young people so that they can flourish. You must also be prepared to work in partnership with other people that are involved in the foster child's life. Approved carers are also trained in the skills required to provide secure and high-quality care. This training includes pre-approval, induction, and on-going courses. Even then, a foster panel must also make a decision on whether the candidate is a suitable care giver. Thus, in evaluating the offence of association of sexual activity with a child family member, it could be expected that the standard must be in accordance with the status or role of the accused (here a foster carer). It is expected that the standard must be in accordance with a responsible body of opinion. If, finally, the appellant had acted within the standard of a responsible body of foster carers (if any) engaging in this kind of activity, he should be acquitted. In the *Thomas* case, Lord Rose highlighted that "the gravamen of this offence, as it seems to us, lies in the abuse of the relationship with a child. It is to the family relationship as defined in section 27 of the 2003 Act that this offence is directed"[566]. It could be inferred that the opinion of any responsible body of foster carers would demand their members to avoid 'abuse of the relationship' with a foster child by that foster carer. Indeed, it also sounds logical to assume that a foster carer should be aware of any legal framework that applies even after the exercise of his responsibilities or once the child has left his supervision or guardianship. As a result, it sounds coherent to require knowledge of the criminality of sexual relationships with a former fostered child over the age of sexual consent, but under the age of 18. Therefore, after assessing the epistemic circumstances of the case under the test here proposed for offences of association, *Thomas'* claim about his false belief about the prohibition should have been declined. The outcome would probably be different from that produced under a standard honest/reasonable test.[567] It could be defensible that the particularities of the offence highlighted above could support excusatory consequences for the ignorance of the prohibition. This potential divergence demonstrates the importance to provide a normative corrector element connected with the accused's standard of awareness as a status holder.

[566] [2006] 1 Cr App R (S) 602
[567] The conclusion would perhaps be different if the test was 'reasonable for an experienced foster carer'

Beard, on the other hand, relates to an offence of disassociation. As a result, the test proposed for these cases by the ECCR is the aforementioned *collateral institutional user test.* The test encompasses the minimum updatable knowledge required to interact legitimately in the institutional framework. It requires from judges or jury members to evaluate the potential mistaken belief about the prohibition of the accused, taking into account the reciprocal expectations that interact within the demands of the institutional framework. From this perspective, as collateral institutional users, we must decide if the accused has lived up to reciprocal institutional expectations in the particular case under examination. Every society has a different institutional framework about the control of firearms. The UK has some of the most stringent firearms controls in the world[568]. Legislation from the 1960s has been amended to restrict gun ownership. Handguns are prohibited and require special permission or a certificate from the police for ownership, of which a number of requirements, like the reasons to possess the requested weapon, must be provided. In particular, the UK has very restrictive legislation about the possession of tear gas and pepper spray which is widely available in the rest of Europe. In fact, jail sentences for possession of tear gas are not uncommon in our jurisdiction.[569] For these reasons, it seems sensible to argue that the *collateral institutional test* would require from the accused a minimum updatable knowledge that the possession of the tear gas canisters were criminal. [570] However, the intellectual capacities of the accused might nevertheless excuse his conduct. We shall consider this possibility in the next section.

c) *Intellectual and physical capacities*

Finally, the last component of the ECRR test relates to those specific capacities that could exclude responsibility. This third step appraises the intellectual or physical capacity of the citizen in the moment of action. In specific contexts the citizen's perception process could be impaired by external conditions. These objective conditions could alter their perception process, affecting their judgement about the need to search for additional information. These personal conditions of the citizen can

[568] Pistols Act 1903, Firearms Act 1920, Firearsm Act 1937, Firearms Act 1968
[569] BBC News "Essex Man Jailed over Stunt Gun and CS Gass Possession" *BBC* (2015)
[570] On the basis that criminal prosecutions for possession of such canisters have been publicised in the media in the past

also affect his responsiveness to the reality that surrounds him. Some perceptions can confuse the citizen as a result of psychic perturbations, mental health conditions, or malfunctions of the sensitive organs. In *Beard*, it was highlighted that the appellant worked in the family business of renting caravans and breeding and racing horses[571]. Furthermore, the prosecution did not challenge the accused's argument that he did not know he was in possession of the canisters. Indeed, they asserted rather that he ought to have known. He said that an unnamed friend had left the gas canisters in the caravan several years before. He believed that they could be blanks. Photographs of the canisters shown in court proved that they were very small and thus it was entirely reasonable to think that they were blanks. They also showed that there was, in fact, a warning on the box of canisters that they contained CS gas, but the appellant was functionally illiterate and could not read the label that, although mainly in German, indicated in English that they contained CS gas. We have argued that in situations where the perception process of the citizen exposes doubts about his intellectual capacities to raise hesitations about the legality of his action, he should be exculpated. Indeed, the Court of Appeal appear to have taken Beard's circumstances into consideration when it quashed his mandatory sentence of five years, replacing it with two years' imprisonment. The position defended in the ECCR would have acquitted Beard instead of merely mitigating his sentence.

7. 4 Beyond suspicion: Personal reflection and reliance on third party advice

The discussions held in Part II of this research have been focussed on the definition and demarcation of false beliefs about brute and institutional facts as well as the institutional command/prohibition. Thereafter, the ECCR has been put into practice. Like an algorithmic test, different situations (cases) have been passed through the ECCR to ascertain if the accused should be held criminally responsible for his conduct. Criminal responsibility, we have shown, would only be attributed when: a) the accused knew the criminality of his action; or b) he was culpably ignorant about his false belief. The key issue concerns the latent and updatable knowledge of the citizen and whether this knowledge triggered, or should have

[571] (2008) 2 Cr App R (S) 32

triggered, a suspicion that the action could be criminal. If this is the case, the accused has three options: to reflect, to seek advice, or to abort his action altogether. However, nothing has been discussed with regards to neither (1) the measures the citizen must take in order to ascertain the truth nor, more importantly; (2) the quality of the information that could exonerate him even if *a posteriori* the belief is proved wrong; or (3) when the obligation to corroborate the information received ends. This is precisely the aim of the rest of the chapter: *to determine the point of inflection where the burden of seeking advice becomes a right to rely on a trustworthy source*.

The rationalisation of the ECCR in this thesis has proven that criminal responsibility is directly attributed to the citizen aware of the criminality of his action with the corresponding intention to carry it out. It also provides justification for guilt when a citizen, not aware that his action was criminal, should have known it. The potential distrust that this second subjective test, only based on other user's perception, would bring to the institutional framework is amended in the ECCR with a normative correction factor. This normative factor, focused on the status holder's perspective, protects institutional user's expectations and reassures mutual confidence between strangers because the extension of the status guides both the holder and those who interact with him. All the arguments in the previous three chapters have been constructed to ascertain when the citizen is or should have been aware that his belief was false. However, we have yet to discuss the criminal responsibility of the citizen, who, suspicious about the criminality of his behaviour, reflects on his action or seeks advice from a third party before embarking on a course of action as a result of that mistaken advice or personal conclusion. Is the seeking of advice or self-reflection of the mislead citizen enough to exonerate them? Could personal reflection exonerate the doubtful citizen who, after research about the criminality of his actions, acts mistakenly? Who can be categorised as a trustworthy source of advice? Finally, should the mislead citizen be held responsible in cases of reliance on a trustworthy source of counsel? If so, when?

No direct transposable academic debate about these issues can be found in current criminal law literature. However, the topic known as reliance on official advice, collaterally or partially relates to the questions presented above. Furthermore, this debate about reliance on official advice probably includes the largest academic

literature supporting exculpatory effects in cases of 'error of law'.[572] Therefore, before fleshing out the above interrogations it would be illuminating to analyse the current academic (and judicial) arguments about these situations where the citizen has relied on a mistaken interpretation or advice provided by officials. The rationale behind this recognition as a defence of this category of 'error of law' are well examined by Chalmers and Leverick in their book about criminal defences. The authors point out three lines of argument in support of the introduction of the defence. First, the "estoppel" argument[573], Ashworth[574], for example, argues that in order to maintain the integrity of the criminal justice process, the courts should not convict a person whom their officers have advised otherwise. The second line of argument rests on due process, constitutional principles,[575] and principles of fairness. Overall, the argument supports the idea that citizens should be given due notice about actions or behaviours that are criminally appraised. Finally, the third argument is a moral one which states that the citizen who relies on mistaken official advice when embarking on a course of conduct is not morally blameworthy.[576] The topic of reliance on official advice has also been discussed in more depth by Ashworth,[577] who identifies four rationales supporting the defence. First, an excuse-culpability based rationale upholds that this kind of conduct is something the state ought to value and foster as responsible and reasonable behaviour. The citizen behaves well by abiding with the advice given and should therefore be excused. Secondly, Ashworth connects the claim of a substantive defence with the principle of legality. The fair warning element,

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[572] See J. Chalmers and F. Leverick *Criminal Defences and Pleas in Bar of Trial* (2006) paragraphs 13.25-13.34; A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002); A. Ashworth "Official Advice and Mistakes of Law" *Crim L R* (1998) 435. S.D. Billimarck "Reliance on an Official Interpretation of the Law: The Defence's Appropriate Dimensions" *University of Illinois Law Review* (1993) 565-588; J. Parry "Culpability, Mistake and Official Interpretation of Law" *American Journal of Criminal law* (1997) 25:1-78; T. White "Relience on Apparent Authority as a Defence to Criminal Prosecution" *Columbia Law review* (1977) 77:775-806.

[573] See J. Chalmers and F. Leverick *Criminal Defences and Pleas in Bar of Trial* (2006) at p278

[574] A. Ashworth "Excusable mistake of law" *Criminal LJ* (1974) p652

[575] J. Chin, R. Griffith, N. Klingerman, and M. Gilkey "The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*" North Carolina Law Review* (2014) 93(1):5.

[576] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p305; S.D. Billimarck "Reliance on an Official Interpretation of the Law: the Defence's Appropriate Dimensions" *University of Illinois Law Review* (1993) 565-588 at pp 577; J. Parry " Culpability, Mistake and Official Interpretation of Law" *American Journal of Criminal law* (1997) 25:1-78 at p21

[577] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002)

inherent to the principle of legality, would be contravened if a citizen that breaks a law that he was unaware of is convicted even where he has been conscientious enough to follow official advice. The third rationale rests on the procedural mechanism of an estoppel argument: the state should be precluded from prosecuting someone to whom it has previously given official yet mistaken advice.[578] Finally, and related to the third rationale, the conviction of a citizen erroneously advised by an official highlights self-contradiction within the criminal justice system, compromising its integrity and unity.

The approach to this issue taken by British courts and tribunals is not conclusive either. Courts have taken a contradictory and unprincipled approach towards this issue. In *Arrowsmith*,[579] for example, where the accused received a letter from the Director of Public Prosecutions informing that his prospective conduct did not contravene the Incitement to Disaffection Act 1934, the defence of reliance in official advice was rejected at both trial and appeal. In other, older cases like *Cooper v Simmons*,[580] *Roberts v Local Authority of Inverness*,[581] and *Cambridgeshire and Isle of Ely CC v Rust*,[582] tribunals have also rejected the defence. In other instances, reliance has been held not to exculpate, but rather mitigates the sentence, as in *Howell v Falmouth Boat Construction co*[583] or *Surrey v Battersby*.[584] The same principles apply to reliance on a judicial decision which is later overruled, as in *Younger*.[585] Nor has it been a valid defence in situations where the accused relied on *ultra vires* legislation.[586] On the other hand, in cases like *Postermobil v Brent LBC*,[587] where members of a planning department advised a company that their action was not illegal, a procedural defence was allowed. In this case, the prosecution was stayed as an abuse of process. American and Canadian Courts,[588] on the other hand, have

[578] A. Ashworth, "Excusable mistake of law" [1974] Criminal LJ 652
[579] (1975) QB 678
[580] (1862) 7 H H& N 707
[581] (1889) 2 white 385
[582] (1972) 2 QB 426
[583] (1951) AC 837 (HL)
[584] (1965) 2 QB 194 (DC)
[585] (1973) 101 ER 253
[586] *Cambpbell* (1972) 1 CRNS 273
[587] (1998) Crim LR 435
[588] The defence is recognised in the United States since the case of *Long v State* A.2d 489 (1949); See also *Raley v Ohio* 360 US 423 (1959). The Supreme Court of Canada recognised the defence of "officially induced error of law" in *R v Jorgensen* [1995] 4 S C R; See also the recent case *Levis (city) v Tetreault* 2006 SCC 12; and J. Chin, R Griffith, N. Klingerman, and M. Gilkey "The

accepted the defence of "officially induced error"[589] in some cases under the due process argument. In fact, this argument has crystallised in some offences of association. Relevant is the recognition of the defence by the Model Penal Code in section 2.04(3)(b), providing exculpation where a citizen relies on an erroneous statement of the law provided by a person or body responsible for the administration or interpretation of the law. Finally, the UK legislative body, in some instances, have enacted a substantive defence, as in section 3(4) of the Control of Pollution Act 1974 where a defence to the offence of disposal of unlicensed waste is provided to those who inform themselves from persons who are in position to provide information. Courts considering the same line of argumentation, however, have been very strict. In *Shaw v DPP*,[590] for example, where the appellant published a ladies directory which listed contact details of prostitutes for a fee, the accused was convicted of conspiracy to corrupt public morals under the Obscene Publications Act 1959 irrespective of the fact that a lawyer advised him before embarking on the business that such an offence did not exist. In fact, the offence was created by the House of Lords to protect the Public majority's morals. Neither reliance on legal advice from a paralegal agent, like in *Brockley*,[591] or incorrect advice from a licensed attorney, as in *Hopkins v. State*,[592] can form the basis of a mistake of law defence. In any case, neither doctrine nor courts have extended the potential excusatory effects or had a supportive approach to reliance on a private lawyer. Guy-Arye, for example, warns of the social cost of allowing the defence,[593] and Hall and Seligman warn that if recognised, lawyers could provide (unfair) immunity from prosecution or conviction for their clients.[594]

The weakest point of all these arguments, already highlighted by Ashworth,[595] is precisely that a purported procedural defence based on estoppel (i.e. abuse of process or integrity of the Criminal justice system) would exclude reliance on private

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Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code" *North Carolina Law Review* (2014) 93(1):5

[589] See *R v Cancoil Thermal Corporation* (1986) 52 CR (3d) 188.

[590] *Shaw v DPP* (1962) AC 220

[591] (1994) Crim LR 671 (CA)

[592] *Edward Hopkins v State of Indiana* No 49S02-0302-CR-54 Decided February 10, 2003

[593] Guy-Arye, "Reliance on a lawyer's mistaken advice: should it be an excuse from criminal responsibility?" 2001-2002 *American Journal of Criminal Law* 455-480. See also J Chalmers and F. Leverick *Criminal Defences and Pleas in Bar of Trial* (2006) at pp285-6

[594] L. Hall and S. Seligman "Mistake of law and mens rea" *University of Chicago Law Review* (1940) 41(8):652

[595] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p306

lawyers or agencies. The advice of private lawyers or legal information provided by independent agencies would not be sufficient to stay proceeding because the information is not provided by an official or civil servant.[596] This flaw implies founding the construction of the purported defence not just on the subjective 'reliance' element, but also (and crucially) *"on the source of the advice relied upon"*.[597] Although nobody can dispute that one of the most relevant duties of a lawyer is providing legal advice, due to this assumed twofold argument of the defence the excusatory effects of reliance on non-official advice does not enjoy academic support. This is despite the fact that advice provided by prominent legal academics or lawyers should be more reliable than a medium or low-grade government official.

However, beyond excluding reliance on private lawyers, a detailed scrutiny of the estoppel argument demonstrates the real flaw of this rationale. The estoppel doctrine derives from the Roman law principle *"venire contra factum propium non valet"* defended by Ulpian's *resposta* in the Digest.[598] In this *resposta*, Ulpian argues that a father cannot claim the nullity of the testament of his deceased daughter based on the nullity of her *emantipatio,* when it was the father himself who emancipated her with unreserved capacity. Basically, it implies that a person cannot act against his previous pronouncements in order to limit the rights of another person that with good faith had trusted in, and relied upon, the initial assertions. The justification for establishing a limit to the autonomy of the citizen who has created a reasonable expectation in other people's behaviour is the protection of trust and good faith. Thus, estoppel was born in the *private law* field where the advantages of avoiding citizen's self-contradiction are imperative. However, to require the same level of self-consistency between a planning officer and the court which considers a case is to take things slightly too far. Beyond that, considering that the official of a council belongs to the same entity (the state) as a judge in the High Court is more than questionable. But, in any case, the function of the criminal justice system is not to indirectly (through a defence) attribute responsibility to the state, but rather to directly attribute (or excuse) responsibility to the citizen charged with a particular crime. Further, and paradoxically, it is the support of the estoppel argument that could undermine the

[596] The issue could be arguable because in England and wales layers are "officers of the court"
[597] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p309
[598] Digest 1,7 25 [1]

integrity or reputation of the criminal justice system. Criminal responsibility must be attributed according to the personal involvement of the accused in the criminal action. Certainly, the existence of a *provocateur agent* (public or private) should be considered, but the straight acquittal of an *a priori* guilty accused would undeniably undermine the integrity of the criminal justice system by imposing a burden that does not correspond to his action(s).[599]

Instead, the rationale that should be highlighted, in order to support a potential defence based on the reliance on erroneous official advice, should be *legal certainty*. The massive number of offences of association existent in our modern societies implicate that nobody is able to know and actualise knowledge about them. It could be assumed that legislative bodies are aware of that; they accept that they cannot be expected from ordinary citizens full knowledge of the current law and any legal *updates*. This duty is, however, expected from lawyers, officials, notaries, law societies, and even legal academics. This argument is at the basis of our massive body of criminal norms. It is the reason that justifies thousands of criminal laws coexisting in our legal system. The administration does not have the expectation that citizens have specific knowledge about all criminal norms. The only expectation that is legitimate for the state to have, is that in cases of doubt about the illegality or criminality of an action, the citizen, before embarking on potentially criminal conduct, will seek legal advice from a trustworthy source. Once the citizen has sought advice from a trustworthy source, to some extent, the criminal responsibility swings to the reliable source.[600] The state assumes that the possibility that the criminal law could be infringed shifts from the citizen to those third parties who provide advice. Regardless if they are officials or private lawyers.

Furthermore, modern societies need quick and efficient institutional frameworks where interaction between citizens take place in an environment of frictionless trust. An essential part of this framework is the conviction that the state and its officials (or private lawyers) provide reliable advice and information about our legal system. We cannot demand of our fellow citizens to verify from a second or

[599] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p319

[600] This statement should not be understood literally in terms that the person providing the (incorrect) advice becomes criminally liable

third source the validity or correctness of the advice provided, otherwise the normal development of our civil life would collapse. Neither can the state expect that citizens should embark on actions with the suspicion that they will be prosecuted or convicted if the information provided turns out to be erroneous. For those reasons, what is required is to establish a normative 'threshold of minimum requirement'. Of course, this objective threshold could always, in theory, be overcome because it is subjectively possible to ascertain the truth about legality. However, the point is that the puzzled citizen who has sought advice from a trustworthy source (and maybe has received misleading advice about the criminality of his conduct) has done enough. A different issue is the description or delineation of this threshold, or under which factors the citizen should challenge the quality of the information or advice provided. We now therefore consider the measures the citizen must take to ascertain the truth, the quality of the information provided, and finally the obligation to confirm or authenticate the information received.

7.5 Normative threshold of minimum requirement[601]

The approach taken in this research differs from the debate summarised above. Our principled approach will not consider reliance cases as an instance of 'mistakes of law', more prone to be successful as a defence. Instead, official reliance will be treated as a one component or element for the threshold from which criminal responsibility will not be attributed in some cases. As it has been systematically defended in this research, what is crucial are the personal epistemic conditions of the citizen: when he has doubts or suspicions about the criminality of his action he must use any resource available to him to overcome any false belief. To achieve this, the citizen has only two alternatives: a) to reflect and investigate and consult statutes by himself to resolve his doubts; or b) to seek advice from third parties.

The complexity of the legal system as well as the massive number of valid offences of association would certainly make it challenging for a citizen to recognise the legality of his action by research. However, the possibility should not be ruled out that in satisfying specific conditions, the citizen who consistently and meticulously

[601] This normative threshold applies in a different way to false beliefs about the existence of a brute fact than institutional facts or prohibitions, due to the particular nature of these cases

has attempted to ascertain the extension of an institutional fact or the law applicable, could be excused even if his final conclusions were mistaken. Two factors should be taken into consideration evaluating whether the effort of reflection reaches a minimum threshold that can justify a defence or not. The first factor is associated with the personal circumstances of the citizen. The appraisal should be focused on the cognitive intelligence of the person to learn, rationalise, deduce and make the right connection as well as the individual's abilities to project future plans, designs or strategies. Significant considerations to consider in evaluating the above abilities would be age, profession, education, and the cultural level of the citizen. Other important components to consider are the comprehensibility and unambiguousness of the institutional framework scrutinised.[602] It is mainly regulative environments that are open to more than one interpretation which could puzzle a citizen willing to act in accordance with the law. Thus, the citizen who, after conducting meticulous research about the extension of an institutional fact or the prohibition of his conduct, acts, for example, according with a line of argumentation held by recent case law, should successfully be able to claim excusatory consequences for his action, should it turn out to be criminal. In any case, all the considerations described above do not have autonomous significance by themselves. The fact that a law student in his final year erroneously embarks on criminal conduct after a meticulous study of an unclear area of the law, does not automatically exclude his criminal responsibility. However, both the personal circumstances of the student and the intricateness of the legal framework should be taken in consideration by the judge or jury when evaluating the criminal responsibility of the accused.

When the personal reflection and investigation of the citizen is not enough for clarification, he has the alternative option of seeking advice from third parties. This alternative brings about the matter of characterisation of the normative threshold of the 'minimum requirement' noted above. In practical terms, it implies determining the point of inflection where the burden of seeking advice becomes a right to rely on a trustworthy source. Three areas need to be considered in order to provide content to this threshold: a) the qualifications of

[602] In *R v Cancoil Thermal Corporation* (1986) 27 CCC (3d) 295 at 303 it was proposed that ambiguity in the law might be a relevant factor to take in account when advice is sought.

the third party who gives the advice; b) the qualification of the advice itself; and finally c) the potential corroboration of the information received.

In our highly regulated modern societies with endless institutional frameworks, the legal system requires reliable or trustworthy bodies and/or individuals able to advise and guide fellow citizens about the current legal framework(s). This duty cannot only be attributed to officials who, in fact, should be paying more attention to the administration and enforcement of the law than providing public advice. For that reason, this paper argues that officials, but *a priori* also lawyers, academics, in-house lawyer, notaries, as well as bodies like the law society, Chambers of Commerce, Confederation of British Industry (CBI), Federation of Small Business (FDB) or similar bodies could be trustworthy sources of advice. Obviously, the person or body should be formally involved in the administration or management of a particular legal area. However, the reliance on these sources does not require from the citizen an inquisitorial approach toward the person or body requested. In general, it could be assumed that the citizen who has doubts about a particular area of the law will be unable to evaluate the capacity or qualification of a person or body questioned. This point diverges from the position held by Ashworth who suggests that advice provided by a junior official or an official that does not work in the right department should not be trustworthy or reliable.[603] Nonetheless, this is the position not surprisingly assumed by the courts. In the aforementioned *Postermobil* case, the Divisional Court held "it was not as though they had requested planning from one of the council's gardeners".[604] The same approach was assumed in the Canadian case of *Jorgensen*,[605] when it was stated that an "official involved in the administration of the law in question, would be considered appropriate officials".[606] The only requirement explicitly demanded from the citizen in order to consider or challenge the trustworthy advice given is that the guidance must be explicit and unambiguous. In practice, this means a sharp pronouncement about the legality of the conduct. In case the adviser presents any doubt or hesitation about the issue, the citizen has the obligation to corroborate the advice. This last point makes reference to

[603] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p305
[604] See discussion of the case in A. Ashworth and J. Horder *Principles of Criminal law* (2013) at p223
[605] R v Jorgensen (1995) 4 SCR 55 at 50 per Lamer CJ
[606] Ibd at p30

another situation where the advice received should be challenged. As Ashworth, for example, suggests, in those situations where the citizen is also an expert and knows that the advice is probably wrong the citizen should not rely on the advice given, or they should corroborate it.[607]

Trustworthy assurance also requires an appropriate process of deliberation by the adviser, grounded in an honest description of the circumstances by the citizen who seeks counsel. The citizen must portray honestly and accurately the circumstances that he believes to be relevant when making a decision on the issue. A one-sided or misleading description of these circumstances can elicit incorrect advice and, in such cases, the information provided cannot be considered trustworthy and the citizen should bear some degree of responsibility. However, and at the same time, a confused citizen who seeks advice cannot be expected to question the cogency of the methodology employed by the adviser as far as it is formally or apparently reliable. It is the responsibility of the third party to inform the citizen about situations or circumstances that could be relevant in establishing the informative statement, but not the other way around. Obviously, any suspicion by the citizen of personal interest by the adviser in the implementation of the conduct will make the representation fraudulent. However, and to summarise, any information is trustworthy when, provided an accurate description of the circumstances involved has been provided by the requester, it emanates from one of the reliable sources mentioned above without any suspicion of personal interest or bias in the information giver.

Finally, it remains to be discussed under which situations the information received requires a second opinion or corroboration by a different adviser. In theory, any potential wrong information or advice is susceptible to corroboration or further scrutiny. However, as mentioned above, although it is always possible to search for advice from a second, third, or perhaps even more sources to corroborate the certainly of advice given, this would jeopardise the daily social interactions that the law aims to regulate. Thus, only in very specific situations does initial advice received from a reliable source require authentication. One example would be in situations where a citizen embarks on manifestly illegal actions under the shield of official advice. This

[607] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p305

group of official reliance cases might be categorised under the doctrine of superior orders.[608] The case *United v Barker*[609], where the accused was authorised (and encouraged) by White House officials to steal information from an office as part of the Watergate scandal, provides a very a good example of these cases.[610] In these cases, the assurance or advice requires corroboration to be trustworthy in the terms defended above. Another area that could require authentication is in situations where the advice provided is manifestly morally blameworthy or harmful to third parties.[611] Equally, when the citizen is aware of divergent legal opinions about the information given corroboration could be mandatory. Finally, those assurances where the adviser proposes a deceitful or dishonest course of action would require corroboration by alternative sources in order to fulfil the requirements of reliability and trustworthiness above established.

7.6 Conclusion

Two significant issues have been settled in this chapter. First, it has been verified that only actual knowledge about the prohibition or command of conduct can preclude excusatory effects for a false belief. This attitude reinforces again the strong aversion manifest in this thesis to intertwine moral and legal concepts. It also reaffirms the paramount significance of the principle of legality in the criminal law domain (*nullum crimen, nulla poena sine previa lege*) sustained in this research: beyond moral appraisals, criminal responsibility can only be attributed to conduct formally categorised as criminal at the moment the action took place. Only criminalised conduct can be an exclusionary reason for action while generating normative expectations in others.

Finally, this chapter discussed how the vast range of criminal law in common law jurisdictions, compared for example with civil codified jurisdictions, affects its knowledge. This considerable amount of criminal legislation has even been referred to as a problem of "over-criminalization". Nevertheless, both common and civil law

[608] Ibd at p306
[609] 546 F 2d 940 (1976).
[610] A. Ashworth "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in S. Shute and A. Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p305
[611] See J. Horder *Excusing Crime* (2004) at p271

jurisdictions regulate more or less the same range of conduct. The reasons why common-law jurisdictions have preferred to rely on criminal law instead of administrative law, for example, is obviously beyond the aims of this research. Rather, the discussion is whether this should be considered a problem, and if so its potential solutions. In any case, the fact is that we have a substantial amount of conduct regulated through the criminal law.[612] Lawmakers are aware of this situation and they do not expect citizens to know all regulatory frameworks. This duty is only expected from lawyers, legal academics or officials. The only legitimate expectation lawmakers can have is that before embarking on potentially criminal conduct, citizens should seek legal advice from a trustworthy source.

[612] See chapter 3

CONCLUSION

> "Following Hume I might say to my grocer: 'Truth consists in agreement either to relations of ideas, as that twenty shillings make a pound, or to matters of fact, as that you have delivered me a quarter of potatoes; from this you can see that the term ("truth") does not apply to such a proposition as that I owe you so much for the potatoes. You really must not jump from an "is" - as that it really is the case that I asked for the potatoes and that you delivered them and sent me a bill - to an "owes" ' ".[613]

The aim of this dissertation has been to provide a principled solution for those situations where citizens acting under a false normative belief unwittingly commit a criminal offence. My aspiration has been to provide an operative and principled approach to this issue by developing an account of what I have called the epistemic condition of criminal responsibility. Of course, epistemic conditions are not the only conditions that matter to criminal responsibility, but this thesis has argued that knowledge of the law, traditionally neglected, should be placed on the same level as other conditions of criminal responsibility like *mens rea* or causation. In doing this, I ruled out the strategy of offering just a set of exculpatory exceptions to ignorance of the law. Instead, I have looked to the relevance of knowledge of the law and introduced a fresh conceptual institutional framework. Within this conceptual framework, the ECCR has developed around the concepts of brute and institutional facts. Within the contours of this new account of the criminal law, trust has been identified as the central aim of the criminal law.

My argument has been that for purposes or *functions* beyond mere biological or physical structures (brute facts) we collectively attribute certain *status(es)* to persons, objects or other entities. The institutional structure derived from this *status function* grants a waterfall of rights and duties that provide those within the institutional framework with a common reason for action in our practical reasoning. I claim that institutional facts guide us, but also disclose to others what they can expect from us. Only within normative frameworks of reciprocal *institutionalised*

[613] E. Anscombe "On Brute Facts" *Analysis* (1958) 18(3):69-72

expectations can we interact, cooperate and *trust* strangers. This is possible because, as rational thinkers, we not only have the ability to conform our behaviour to reasons, but also to take into account the mental states of others. We have the capacity to recognise that the deliberation of others will depend on expectations about what we will do. Thus, we can build up our plans on the *expectation* of the responsiveness of others. This is the essence of *interpersonal trust* that I argue the criminal law underlies. However, in some cases, normative institutionalised expectations also need a mechanism of reassurance. Criminal punishment performs this function against conduct that could jeopardise the institutional configuration of a society: criminal punishment underlies institutional trust reassuring citizens that the institutional framework is still valid even in cases of isolated violations.

Within this institutional conceptual framework, the unsettled traditional mistake of fact/law distinction has been substituted for the coherent and consistent trilogy of false beliefs about brute/institutional facts and institutional commands. Furthermore, the ECCR has proved to be an autonomous (from *mens rea*) algorithmic test able to effectively distinguish culpable from non-culpable ignorance in all of the above false beliefs. Starting from the latent (but updatable) knowledge that the citizen has before action, the ECCR has evidenced that, as reason responsive agents, we should only be held responsible when we disregard the suspicion that our conduct could be criminal. Additionally, the ECCR, introducing the status holder's perspective, has provided a coherent mechanism to resolve those cases where the lazy or indolent agent has done little to ascertain the truth. The range of real cases discussed in this thesis and the principled conclusions provided by the ECCR have demonstrated its practicality and coherency in dealing with the controversial and difficult problem of adequately recognising the exonerative effects of false normative beliefs.

My approach is clearly different from current works about the topic, which are focussed mainly on justifying excusatory arguments for ignorance of the law. As this thesis has argued, a principled solution will be difficult to achieve without a thorough discussion of two particularly interconnected topics: the relevance of knowledge of the law; and the model of criminal responsibility. Any commentator on common law jurisdictions who aspires to provide a coherent solution for ignorance of the law needs

to consider to what extent knowledge of the law is relevant. This discussion can only be understood in the context of the conditions of criminal responsibility, because it seems difficult to justify the significance of knowledge of the law without recognising its impact on the *ex ante* deliberation process of the citizen. Knowledge of the legal rules can only be relevant within a reason-responsive account of criminal responsibility. In this version, responsibility is attributed by virtue of our capacity to respond and be guided by legal reasons. Criminal responsibility would be attributed *only* when the citizen fails to exercise his capacity as a reasonable and responsible agent.

The above argument could, I suspect, cause difficulty for legal moralists who categorise law as a subcategory of morality. For them, citizens only need to be guided by moral reasons because only culpable wrongs provide a desert base argument for punishment. Thus, criminalising certain conduct is completely irrelevant because it does not introduce new arguments for desert. Within this account, ignorance of the law is immaterial for punishment. This is due to the difficulties that the moralists have in reconciling their arguments with the demands of the principle of legality, particularly with the *nullum crimen, nulla poena sine praevia lege poenali* constraint. To them, it would be manifestly unfair to punish a citizen for breaking a purported criminal rule that could not have been considered as a reason for their action. It seems then that legal moralists need to first accommodate their moral base desert to the demands of the principle of legality in order to recognise that knowledge of the law is key to criminal responsibility.

Alongside this argument about the importance of knowledge of the law, and closely connected with its consequences, is the proposal about the function of both criminal law and punishment suggested in this thesis. Justification of criminal punishment has been a controversial topic for decades among criminal theorists. For those focussed on forward-looking considerations, punishment is instrumentally justified, whereas for those who emphasise backward-looking considerations, offenders simply deserve punishment for their crimes. Both retributivist[614] and consequentialist approaches have faced objections and thus hybrid proposals for

[614] See J. Rawls "Two Concepts of Rules" *Philosophical Review* (1955) 64:3–32; see also H.L.A. Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) pp8–12

criminal justification have also emerged. In any case, it seems like the function of the criminal law and the function of criminal punishment are in some way treated as convergent, as though the aims of the criminal law could be reduced or distilled into the aims of criminal punishment.

Of course, punishment is an important institution requiring justification, but it is equally important to identify the main function of punishment. Institutions are end orientated and only by isolating the function of criminal punishment can its actual success be evaluated. In any case, not everything can be explained in terms of punishment in criminal law, and the function of the criminal law cannot merely be understood in terms of the function of criminal punishment. Furthermore, a sharp differentiation needs to be established between criminal punishment and the criminal behavioural rule whose infringement justifies that punishment. It seems obvious that the aims of both concepts are different and in fact, as is the case, divergent. This differentiation is key because, as it has been defended in this thesis, it is these behavioural rules which underly interpersonal trust. For that reason, knowledge of the behavioural rules is essential to our interaction with others.

In identifying the function of the criminal law with the function of punishment, we restrain the scope of the criminal law from the very beginning. Criminal law is not a body of laws intended solely to target criminals or potential offenders as, for example, corporate law relates solely to the rights and relations of companies and business. Indeed, criminal laws are not only addressed to those citizens who have the temptation to commit a crime; their scope is wider. Rather, criminal laws are addressed to society as a whole, which includes a majority of citizens who do *not* have a propensity towards the commission of crimes but want to live in a secure institutional environment. As social creatures, citizens who live in institutionalised frameworks need norms, rules, policies, and procedures to ensure seamless and efficient interaction with others. These norms guide citizens, letting them know how to behave and interact with others. Legal norms also frame and institutionalise the expectations we have from others. Civil order is only possible within an institutionalised framework. It is only within this secure framework that we can plan our daily lives with the expectation that others will comply with these legal norms. Only within this institutional framework can we *trust* others. For this reason,

the *ex ante* communicative function of criminal behavioural legal norms needs to be recognised and heightened. It is for this reason why knowledge of the law is of particular relevance.

Criminal laws also communicate in advance that the expectation of the stability of legal norms will be maintained by criminal punishment, even in cases of violation. The function for punishment proposed in this thesis (endorsing *institutional trust*) is perhaps the weakest part of the institutional framework here defended. The idea that criminal punishment reinforces trust in the institutional structure itself, although requires a deep scrutiny about its implications, does not seem inconsistent. However, the argument that the convicted accused must suffer the consequences of punishment in order to reinforce the institutional structures is the frailest part of the institutional framework here proposed. This communicative function would certainly contradict the Kantian "end-in-itself" categorical imperative to treat human beings as an end in themselves and requires further research.

In any case, the central inference about the significance of *trust* in the functional account of the criminal law is that both criminal behavioural norms and punishment play a key communicative role. This communicative character emphasises the values and requirements of the legality principle in the criminal law arena. Thus, criminal laws need to be accessible, certain, foreseeable, and predictable. It is essential that citizens are able to know from the wording of the relevant criminal laws what acts or omissions will make others liable and what penalty will be imposed. This accessibility to the law allows citizens to organise their life within the institutional framework, while also providing awareness about the ways in which his expectations are protected by criminal norms. Evidently, the wording of statutory laws cannot be absolutely clear-cut to avoid excessive rigidity. For that reason, some laws are inevitably couched in expressions which are vague and will require interpretation based in practice. However, these potential grey areas do not render the laws incompatible with the requirements of accessibility and foreseeability.

As it was mentioned in this thesis, this requirement of certainty or predictability could be fulfilled even if the citizen has to investigate or take appropriate legal advice to evaluate the outcomes which a given action may entail.

This is particularly true in cases of offences of association where the citizen is expected to take special care, appraising the risk that a particular activity could entail. However, in any system of law, there is always an unavoidable element of judicial interpretation. This role of adjudication entrusted in the courts is even more manifest in common law jurisdictions. In any case, interpretation on a case-by-case basis needs to be consistent with the essence of the offence, and the outcome needs to be reasonably foreseeable. Finally, and according with the communicative role of criminal punishment, the predictability requirement should apply to the elements of the offence/defence but also to the applicable penalty.

This thesis has not dealt with those situations where a citizen´s conduct is criminal because he *mistakenly* believes that it is permissible. However, although the approach here defended applies directly to false beliefs it would have further implications in addressing other areas of the criminal law like for example mistaken beliefs. I can't develop this in topic in full here, but I shall say something brief about it. Currently these situations are discussed under the heading of mistake about a defence or putative defence. Among putative defences, mistaken beliefs about self-defence in particular is a highly controversial topic that has attracted an enormous amount of academic attention. Within the epistemic approach of this thesis it would be perhaps more appropriate to categorise such circumstances as *mistaken beliefs* about a *justification*. This is because according with the reasons-responsiveness account of responsibility defended in this thesis, mistaken beliefs are only feasible with respect to justifications. Only justificatory conditions form part of the deliberation process of the agent, thus mistaken beliefs can only arise in this domain. Mistaken beliefs about an excuse are unrealistic because the nucleus of any excuse is the impairment of the citizen´s deliberative mechanism.[615] For that reason, in cases of insanity, coercion, drunkenness, or non-age, the cause of exoneration is that the accused cannot respond to reasons because his ability to respond and be guided by reasons is damaged or diminished.

[615] The excuse/ justification debate goes beyond the scope of this research but, within the reason-responsiveness account of criminal responsibility defended here, justifications are reasons balanced in the deliberation process by the citizen as, for example, in cases of self-defence, consent, and some types of necessity. Excuses, on the other hand, are situations not considered in the deliberation process. In fact, excuses are granted because the deliberation process of the citizen was somehow diminished or damaged, as in cases of coercion, insanity, automatism, and non-age.

I have intentionally avoided this topic (which probably requires a thesis by itself) in the present thesis, and I am going to avoid the temptation to direct any future research towards it within the institutional framework here proposed. In any case, I would like to illustrate that both the institutional framework suggested in this thesis and the trilogy of false beliefs proposed can accommodate mistaken beliefs about justifications. The mistaken belief in this field could refer to three kinds of situation. In the first kind, the citizen mistakenly believes that a particular course of action could be justified: his mistaken belief is about a 'non-existent' justification.[616] The second situation could arise when the citizen knows the legal framework, and is aware that a particular valid justification exists, but his mistaken belief is about the *extension* of the particular defence. In the final hypothetical situation, the citizen's mistaken belief would be about factual (brute) elements of the justification. In this situation the citizen's mistaken belief is about the *existence* of objective elements or requirements of the justification. The best example could be the so-called putative self-defence. In short, both the institutional conceptual framework and the trilogy of false beliefs suggested in this thesis can provide (with proper discussion) a solid basis for further investigation about mistaken beliefs about justifications.

[616] The case of *Clark v Syme* (1957) JC 1,5 mentioned in chapter 5, where a man threatened to (and then did) kill his neighbour's trespassing sheep, believing he had a legal right to defend his property after giving due notice provides a good example.

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