

JURISPRUDENTIAL CONNOTATION AND NORMATIVE JUDGMENT OF COGNITION MISTAKES OF ILLEGALITY

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The circumstances of the cognition mistakes of illegality primarily arise in the types of statutory offenses, whose legislative value emphasizes the normative maintenance of social order. Allowing actors to raise a defense based on the existence of the cognition mistakes of illegality aligns with the requirements of rights protection. Grounded in the principles of modern rule of law and the balance between rights and order, it should be recognized that the cognition mistakes of illegality can affect culpability, and further, specific criteria should be established for determining the negation or mitigation of culpability in cases of such mistakes. The determination of whether a cognition mistake of illegality has been established should adopt the actor standard, which corresponds to a logic prioritizing rights. In contrast, the determination of whether the mistake was avoidable should primarily adopt the ordinary person standard, supplemented by the actor standard, which corresponds to a logic prioritizing social order while accommodating the balance of rights.

With the expansion of legislative provisions on statutory crimes in China, the accompanying issue of how to reasonably grasp conviction and sentencing has attracted increasing attention from both academic and practical circles. In this regard, there are different practical demands for effectively using criminal justice to reasonably balance the expansion of criminal legislation. ‘Because statutory crimes have weak anti-ethical and immoral nature, and the constitutive elements of certain statutory crimes are quite complex and professional, it is not easy to judge whether they violate the law based on moral norms, which greatly increases the probability that actors lack awareness of the illegality of their actions.’¹ Furthermore, China’s criminal legislation does not contain direct provisions on cognition mistakes of illegality, but cognition mistakes of illegality at the theoretical level can develop effective paths for exclusion of criminal liability through interpretive theory. We will not discuss here issues related to the systematic

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1 TAN ZHAOQIANG, STATUTORY CRIME THEORY AND PRACTICE, at 155 (Shanghai People’s Publishing House, 2013).

status of cognition mistakes of illegality, such as the intent theory and the liability theory. On the one hand, a basic consensus has been reached on the corresponding systematic status; on the other hand, the analysis centered on the interpretation of exclusion of criminal liability is carried out more in the sense of criminal law interpretation methodology, whose main purpose is to find the substantive reasons for such interpretation. Aiming at the goal of interpreting exclusion of criminal liability, existing studies mostly conduct analysis around the avoidability of cognition mistakes of illegality. On the one hand, they affirm that the act constitutes an illegal act, thereby safeguarding the authority of legal norms; on the other hand, they conduct an interpretation of exclusion of criminal liability through substantive judgment, thus reflecting the unity of reason and law. At the jurisprudential level, the addition of legislation on statutory crimes and the plea of cognition mistake of illegality correspond to the jurisprudential values of order maintenance and rights protection respectively. Although the value of order has a certain degree of independence, the rights protection is a basic value presupposition of a rule-of-law country. Cognition mistake of illegality is not merely a purely criminal law issue; the relative balance between the values of rights and order at the jurisprudential level constitutes its basic jurisprudential logic.

I. JURISPRUDENTIAL INTERPRETATION OF THE VALUES OF RIGHTS AND ORDER SURROUNDING STATUTORY CRIMES

The legislation on statutory crimes and the claims of cognition mistakes of illegality reflect different value orientations, which essentially belong to the different value bearings of order and rights. In this regard, some views hold that ‘the conclusion that the lack of awareness of illegality can negate liability is a result of the full extension of private rights, and many views wander between the two value pursuits of public welfare and private rights.’² Public welfare mainly corresponds to the maintenance of order, while private rights mainly correspond to the principle of liability in criminal law. The legislation on statutory crimes directly protects an order value

² Wang Zhiyuan, *Between ‘Public Welfare’ and ‘Private Rights’: Revisiting the Issue of Awareness of Illegality*, 1 *The Jurist* 116 (2015).

inclined to administrative management. In statutory crimes, the regulation of administrative management order is the indirect maintenance of order by criminal law through ensuring the effectiveness of the prepositive legal system. ‘In comparison, statutory crimes have a stronger dual illegality than natural crimes. Before violating criminal law, they must be regulated by other laws; otherwise, criminal law shall not intervene.’³ However, since the legislation on statutory crimes obviously involves different value orientations, clarifying its value content is of fundamental significance.

*A. The Corresponding Legal Interest Content of
Statutory Crimes in the Context of Rights and Order*

Rights and order correspond to different interpretations of legal interest content. The definition of legal interests of statutory crimes is often controversial. For example, there is a debate on whether the legal interest content of statutory crimes tends to order or rights. Some even hold that statutory crimes do not infringe upon legal interests because most statutory crimes are formal crimes. ‘Formal crimes do not infringe upon or threaten legal interests, nor even pose an abstract danger of infringing upon legal interests; they merely violate administrative regulations in essence.’⁴ Some advocate the theory of legal interest reduction. ‘Whether a certain interest can become a public legal interest and thus be protected by criminal law can be reasonably judged by whether the interest can be reduced to personal interests and what interests individuals will lose as a result.’⁵ Some views explicitly advocate the independent value of order-based legal interests. In fact, the content of legal interests at the legislative level has a weak guiding role in interpreting the constitutive elements of crimes, while the definition of legal interests at the interpretive level is more practically significant for the interpretation of exclusion of criminal liability for individual crime norms. For the interpretation and application of statutory crimes, attention should be paid to the reasonable

3 Wang Weining, *Criminal Law Control in a Risk Society: Reflections Based on Statutory Offenses*, 5 Journal of Law Application 105 (2011).

4 Liu Yanhong, *Absence of Legal Interest and Decriminalization of Mala Prohibita: Taking Double Limit Interpretation of Administrative Elements as the Path*, 1 Journal of Comparative Law 88 (2019).

5 Zhang Mingkai, *On the Substantial Concept of Legally Protected Interests: Affirmation of the Concept's Function of Criticizing Legislation*, 1 The Jurist 80 (2021).

definition and interpretive guidance of substantive legal interest content. It is generally believed that the order infringed upon by statutory crimes also falls within the scope of legal interests. When the damage to order reaches a certain degree of harm, it will be regulated by criminal law. Therefore, the content of the order is an interest protected by criminal law, while rights-based legal interests are incidentally protected interests. In this regard, rights can even be regarded as a component of generalized order, that is, subjects of rights exist in the objective world of order, and the infringement of their rights will cause certain harm to order in different senses. In fact, the distinction and balance between order and rights are mainly issues between public interests and individuality. The rights are inherently characterized by freedom and have the jurisprudential effect of requiring state public power subjects to perform their obligations. In fact, natural crimes and statutory crimes have different value tendencies.

Firstly, natural crimes focus on protecting rights, and the active protection of rights can also prevent the chaos of order caused by the infringement of rights. The legal interest content of statutory crimes tends to effectively maintain order, and the protection of order can indirectly prevent the impairment of rights caused by the chaos of order. Natural crimes can also be said to be serious violations of civil legal norms, because crimes themselves are usually serious tortious acts. Both natural crimes and statutory crimes have the significance of protecting rights and order; they are not in an opposite state, but they have different value hierarchies. The primary value of statutory crimes focuses on the maintenance of order, which is related to the operational purpose of administrative power. 'The provisions on statutory crimes must always take into account the administrative management policies and systems, adapt to local conditions and circumstances, and balance the interests of the state, society, and individuals.'⁶ The legislative purpose of statutory crimes is to better maintain social order, and rights are either indirectly protected objects or subsidiary protected interests.

Secondly, it is sometimes necessary to coordinate the value content between administrative law as the prepositive law and criminal law as the guarantee law. Although criminal law and administrative law have consistent purpose orientations at the level of legal order, they have different interest

6 Liu Yanhong, *The Function of Legally Prescribed Punishment for Blank Criminal Law Norms: An Analysis Against the Background of Modern Rule-of-Law States*, 4 China Legal Science 140 (2004).

priorities. ‘Administrative law is a legislative norm concerning social management, and its attributes can be summed up as management and efficiency; criminal law is a legislative norm for punishing crimes, and its attributes can be summed up as justice and objectivity.’⁷ As a guarantee law, criminal law inevitably has the indirect task of maintaining order, but it should try to reduce the instrumental characteristics of criminal law as a management tool. The order infringed upon by statutory crimes is an interest, but the purpose of maintaining order includes the content of rights. Therefore, in addition to the formal order value, the legislative value of statutory crimes also has the value of rights protection. The issue of rights and order is not only what statutory crimes themselves need to face, but also a jurisprudential category that should be considered when actors have cognition mistakes of illegality.

*B. Rights Claim as the Defense Basis for Cognition Mistakes of
Illegality in Statutory Crimes*

The mere shaking of the presumption of knowing the law and the principle of liability only indicate that cognition mistakes of illegality should be recognized in statutory crimes, and the occurrence of such mistakes should be given the effect of affecting liability, but they do not play an obvious guiding role in specific reasoning.

1. The Effect of the Shaking of the Presumption of Knowing the Law and the Implementation of the Principle of Liability. — Firstly, the shaking of the presumption of knowing the law is only a prerequisite for the establishment of cognition mistakes of illegality, not its theoretical basis. The shaking of the presumption of knowing the law itself is the logic of power governance and order maintenance, not the logic of rights protection and individual freedom. From the perspective of power governance, on the one hand, the shaking of the presumption of knowing the law is not only because the public lacks the ability to understand due to the increase in the number of norms. Even in the face of a complex normative system, the state may still adhere to the absolute presumption of knowing the law to maintain the authority of the law, which involves the inevitable restriction of power by rights. On the other hand, the

⁷ Zhao Yunfeng, *The Review and Response to the Criminalization of Administrative Offense*, 2 Political Science and Law 102 (2018).

absolute presumption of knowing the law is not a purely utilitarian stance. Taking *Bentham's* utilitarian legal view as an example, it emphasizes that legislation must be based on the happiness of the whole nation.⁸ However, it is difficult to regard the absolute presumption of knowing the law as an embodiment of utilitarian criminal law, because the possibility of cognition of illegality is mainly aimed at ordinary citizens. If priority is given to the active maintenance of the ruling order, it is a deviated utilitarian criminal law view. The absolute presumption of knowing the law will produce the logic that unjust law is still law, which can hardly be said to be utilitarian. The shaking of the presumption of knowing the law is not only the result of the awakening of rights, but also a kind of protection and response of power to rights. In cases involving cognition mistakes of illegality, the shaking of the presumption of knowing the law shows that actors have the right to claim the existence of cognitive mistakes, and the content of individual legal interests characterized by rights thus forms an effective restriction on the content of collective legal interests characterized by order. 'Affirming the effect of excluding criminal liability for cognition mistakes of illegality is conducive to correcting the tendency of excessive criminalization of the concept of collective legal interests in the era of statutory crimes, thereby providing defendants with a subjective mechanism for excluding criminal liability that is different from the objective mechanism.'⁹ The subjective aspect revolves around the actor's understanding of the norms, starting from the actor's subjective perspective, and combining both subjective and objective aspects, as well as the comprehensive measurement of the actor and ordinary people.

Secondly, the theoretical basis of pure liability needs to be further specified. Although liability-based criminal law is based on the concept of retributivism, the essence of the principle of liability is still for the purpose of protecting the rights of actors. Cognition mistakes of illegality are not only related to punishment, but first of all related to the establishment of a crime. From the perspective of punishment, the principle of liability requires that unavoidable legal cognitive mistakes or situations of complete ignorance of the law should not be condemnable. The condemnability at the liability level

8 XU AIGUO, INTELLIGENCE HISTORY OF WESTERN CRIMINAL LAW, at 89 (China Democracy and Legal System Publishing House, 2016).

9 Wu Tong, *Testify Dilemma and Outlet of Illegal Cognition Error*, 3 Studies in Law and Business 127 (2022).

can be understood as arising from the intentional violation of norms. If the actor has no understanding of the norms, it is difficult to say that he shows an attitude of violating the legal order. Therefore, there is a certain connection between the principle of liability, normative condemnability, and unavoidable legal cognitive mistakes. Although the principle of liability is one of the theoretical bases for cognition mistakes of illegality, it is not sufficient to indicate the specific content of the interpretation of excluding criminal liability starting from the right to defense. Therefore, through the shaking of the absolute presumption of knowing the law and the principle of liability, it can be known that, on the basis that cognition mistakes of illegality can be established, the reasonable balance between rights and order is the basic jurisprudential content involved in the issue of cognition mistakes of illegality. The rational governance of power should also be observed from the perspective of rights protection. The principle of liability in criminal law has the essential attribute of restricting the power of punishment, and the content of rights and order behind the shaking of the presumption of knowing the law and the principle of liability will also be reflected accordingly.

2. *The General Jurisprudential Balance Between Order Maintenance and Rights Protection in Statutory Crimes.* — If we deny the significance of cognition mistakes of illegality in the interpretation and application of criminal law norms, it will be difficult to effectively balance the normative purposes between order maintenance and rights protection. ‘On the surface, the handling of cognition of illegality is a personal issue, but behind it is the issue of how the state and individuals distribute responsibilities in real situations.’¹⁰ Due to the long-standing shaking of the absolute presumption of knowing the law and the implementation of the principle of liability, it is necessary to take a reasonable balance between rights protection and order maintenance as the jurisprudential basis for handling cognition mistakes of illegality in statutory crimes. The essence of the issue of cognition mistakes of illegality needs to be traced back to the comprehensive implementation of the principle of liability under the condition that the presumption of knowing the law is shaken. If the rational governance of power demonstrates the theoretical basis of cognition mistakes of illegality from the state’s

10 Tong Dehua, *Capability of Illegal Cognition: Position Reset and Function Reconstruction*, 3 *The Jurist* 152 (2022).

side, then it corresponds to the enhancement of the public's awareness of rights protection, so the power governance needs to correspond to rights protection. If the protection of rights in the case of cognition mistakes of illegality is taken as the starting point of its interpretation and reasoning, then it will inevitably tend to adopt the liability theory characterized by the claim of rights and the response of order. Even in terms of different judgment standards for cognition mistakes of illegality, it is more in line with the reasonable balance between rights and order based on rights protection.

II. THE BASIC JURISPRUDENTIAL CONNOTATION OF COGNITION MISTAKES OF ILLEGALITY BASED ON RIGHTS

After the state's presumption of knowing the law is shaken and the public's awareness of rights is awakened, claiming the existence of cognition mistakes of illegality can be regarded as a right of the actor, and such right content will not increase the state's obligation burden. Legislation is an activity of distributive justice. Citizens have the obligation to abide by the law, but legislation cannot require citizens to understand all the content of legislation. After the actor claims the existence of cognition mistakes of illegality and its specific reasons, the interpreter has the obligation to judge and reason accordingly, that is, to make a judicial judgment on whether the mistake is established, and also needs to explain the specific judgment reasons. If the cognitive mistake is established, the entire judgment process of whether it can be avoided will reflect the basic requirements of rights protection.

A. The Specific Judgment of Cognition Mistakes of Illegality Should Start with the Exercise of Rights

Although the legislative value of statutory crimes focuses on order maintenance, when the actor makes a cognition mistake of illegality, the order value in the sense of this legislative purpose and individual rights are in a state that needs to be balanced. The denial of the principle of absolute presumption of knowing the law and the granting of the actor the right to claim the existence of cognition mistakes of illegality have reflected the characteristics of rights protection in the case of legal cognitive mistakes. It is easy for statutory crimes

to have cognition mistakes of illegality. For some administrative provisions, even judges may have differences in understanding, and illegality itself often has many doubts due to legislative expressions. For example, regarding the application of the criminal law on the crime of producing and selling counterfeit drugs, there are corresponding follow-up normative manifestations at the pre-legislative level. Compared with the provisions of article 48 of the former *Drug Administration Law*, the provisions of article 98 of the newly revised *Drug Administration Law* have deleted the provisions of ‘being deemed as counterfeit drugs’ and ‘being deemed as substandard drugs’ in the former law, and also restricted the scope of specific matters. Consequently, when it is difficult to identify counterfeit drugs in practice, it is usually convicted and punished for the crime of illegal business operation. After the legislation adds the crime of obstructing drug administration, the provision of ‘sufficiently endangering human health’ is mainly to distinguish the boundary between administrative illegality and criminal illegality. At this time, in addition to the possibility of misunderstanding the prepositive law, there may also be factual cognitive mistakes about the drugs themselves and the situations that sufficiently endanger human health.

*B. The Element of Rights Runs Through the Reasoning Around
the Existence of Cognition Mistakes of Illegality*

Under the condition that the doctrine of necessity of cognition of illegality has basically reached a consensus, the actor should be granted the right to claim the existence of cognition mistakes of illegality. From the requirement of rights protection, a basic framework for logical reasoning can be set for the specific judgment in the case of cognition mistakes of illegality.

Firstly, the actor’s claim of the existence of cognition mistakes of illegality is the specific reasoning starting point in the interpretation of excluding criminal liability. The reason why the situation of cognition mistakes of illegality affects the actor’s liability is that although the legislation of statutory crimes has the dual values of order maintenance and rights protection, this situation affects liability intent rather than constitutive element intent. If the key to the judgment of factual mistakes is the act, which belongs to the actor’s doubt about the content of the act, then the key to the

judgment of legal mistakes is the norm based on rights, which belongs to the actor's doubt about the norm, and such doubt is specifically reflected in the ignorance or wrong cognition of the legislative provisions. The regulation of the actor's behavior by legislative provisions should be based on the premise that the norm can be effectively recognized by the subject. In the case of statutory crimes, the actor's claim of the existence of cognition mistakes of illegality directly reflects the conflict between the act and the norm, and further substantially reflects the need to balance rights and order. The subject of rights needs to first defend against the subject of power; otherwise, such a right will be abandoned for not being claimed. Moreover, if the actor does not claim it, others will find it difficult to know whether he has cognition mistakes of illegality. With the claim of the subject of rights, the subject of power as the interpreter has the obligation to respond. Both rights and power are core concepts of the modern rule of law. 'The practical basis of the right-power structure lies in that it is the micro-foundation shared by all governance.'¹¹ When there is a cognition mistake of illegality, the actor is classified as the subject of rights, and the state representing order belongs to the side of power. This is an abstract identification of the main participants in the specific reasoning process. In addition, in terms of the formulation and compliance of norms alone, when the norm is in a relatively static state, it follows the logic from formulation by the subject of power to compliance by the subject of rights. When the norm is violated, it follows the logic from the irregularity of the subject of rights to the regulation by the subject of power. In this regard, the actor needs to first claim that he has a cognition mistake of illegality.

Secondly, the reasoning around the content of rights is reasonable as a solution to cognition mistakes of illegality. The claim of cognition mistakes of illegality will affect the judgment of liability. The right to claim the existence of cognition mistakes of illegality lies with the actor, while the right to judge whether it is established lies with the judicial authorities. This can reasonably control such a claim of rights to a certain extent. First, the right to claim the existence of cognition mistakes of illegality can not only be directly qualified as an existing right, but also said to derive from the presumption of rights. However, the presumption of rights is not blind, because blindly

11 Liu Yang, *The Construction and Interpretation of Basic Legal Concepts Focusing on the Relationship Between Rights and Power*, 9 Social Sciences in China 112 (2018).

presumed rights are difficult to be effectively implemented without reasonable institutional protection. Therefore, claiming the existence of cognition mistakes of illegality is at least a necessary presumed right of the actor, which is a basic presupposition of the rule of law value. Second, the right to claim the existence of cognition mistakes of illegality corresponds to the reasonable control of obligations and powers. Although the interpreter has the obligation to respond to the actor's claim, this response is not a pure obligation burden, but also a promoting factor of judicial justice. The comprehensive judgment of the avoidability of mistakes is to seek a reasonable solution based on facts, and try to achieve a relatively balanced state between rights and order.

Thirdly, the doctrine of moral responsibility in criminal law also has the attribute of rights protection, which can be used as the reasoning basis for the content of rights in the case of cognition mistakes of illegality. No matter how the theory of liability in criminal law develops, it will not deny such a basic definition of morality and freedom. 'The essence of liability is the condemnation of the actor's behavior. Whether it is moral liability condemnation or legal liability condemnation, it must originate from human nature — freedom of will.'¹² Modern freedom of will includes the actor's own freedom of will and the inner expectations of ordinary people in society. In terms of the inner expectations of ordinary people in society, legal liability should conform to the general social cognition in the sense of moral condemnation. The law can selectively promote a small part of morality, but the law itself cannot violate basic moral emotions. It is not reasonable in the sense of moral responsibility to let an actor with an unavoidable cognition mistake of illegality bear liability, or not give a person who sincerely believes that he is not intentionally violating the law any right to defense.

C. The Analysis Around the Element of Rights Is Conducive to Placing Normative Application in the Context of the Rule of Law

Rights analysis is not only conducive to strengthening the legitimacy of the application of criminal law, but also conducive to reaching the most legitimate and reasonable application results. Considering cognition mistakes

12 HE RONGGONG, LIBERAL ORDER AND LIBERAL THEORY OF CRIMINAL LAW, at 61 (Peking University Press, 2013).

of illegality at the level of culpability, on the one hand, will not distort factual intent and is conducive to maintaining the authority of norms; on the other hand, it can ensure the full investigation of rights at the liability stage, which is conducive to the judicial protection of rights based on facts and norms. At the specific analysis and reasoning level, the normative judgment around rights is more conducive to judicial authorities to carry out relevant reasoning around the issue of cognition of illegality, which reflects a stronger hierarchy and reasoning. It is precisely based on the principle of rights protection that when a cognition mistake of illegality occurs in a statutory crime, the subject of power bears more obligations in the specific reasoning process. State power is not only reflected in the authority of norms, but its corresponding obligation of rights protection also requires a comprehensive judgment and reasoning on the citizen's state of ignorance of the law. 'All normative evaluations in the theory of crimes are carried out according to the purpose of the national legal order, while in the case of cognition of illegality, the subject who evaluates whether the act is legal or not is the actor himself.'¹³ In this regard, whether the actor knows the law is the actor's own judgment standard and the right to claim, and this claim of whether he knows the law originates from the actor's claim of rights; otherwise, it is against the principle of justice to condemn him with criminal law. In the process of the modernization of the rule of law, the issue of cognition mistakes of illegality in statutory crimes should start with the actor's claim of rights, follow the requirements of rights protection, and then try to construct a reasonable interpretation plan around the balance between rights and order when a cognition mistake of illegality occurs in a statutory crime.

III. THE INTERPRETATION OF COGNITION MISTAKES OF ILLEGALITY BASED ON RIGHTS

Regarding the issue of cognition mistakes of illegality, there is a debate on its systematic status. This paper does not conduct a specific comparison and analysis of the intent theory, liability theory, etc., but directly aims at the decriminalization orientation and its specific content at the interpretive level. In this regard, as some views point out, 'at present, the debate on whether cognition of illegality is necessary and its systematic status has been replaced

13 Chen Xuan, *The Principle of Culpability, Preventive Policy, and Awareness of Illegality*, 5 Tsinghua Law Journal 89 (2018).

by the more pragmatic issue of the unavoidability of cognition mistakes of illegality. In this context, the focus of the issue of cognition of illegality lies in the judgment of the unavoidability of mistakes and its application in decriminalization.¹⁴ On the issue of cognition mistakes of illegality in statutory crimes, regarding the judgment standard of the avoidability of mistakes, there are generally the actor standard theory, the ordinary person standard theory, and the theoretical theory that takes both the actor standard and the ordinary person standard into account. Based on the corresponding standard theories, more substantive reasoning content should be given to the specific decriminalization interpretation, to achieve a reasonable interpretation and application based on legality.

A. The Jurisprudential Balance of Rights and Order Content in Normative Judgment

In recent years, active criminal legislation activities have shown distinct order-oriented characteristics. ‘Out of the demand for safety and order values, criminal legislation has increasingly shown a prevention-oriented, policy-oriented and future-oriented trend.’¹⁵ Such order orientation should be subject to corresponding right restrictions. When balancing the right value and order value of cognition mistakes of illegality in statutory crimes, the following aspects should be mainly focused on. Firstly, adherence to the basic status of right content is a basic requirement of the modern rule of law. Although the social structure is constantly developing, rights have always been an important content in a law-based society. At the basic jurisprudential level, rights are usually superior to order. The order and the right demands behind it should be clarified; that is, we should often think about the state presented after subtracting the substantive order from the rights, and balance the protection of rights and the maintenance of order from different perspectives. Secondly, the maintenance of order is the focus of the value content of statutory crime legislation, but such legislation is worthy of reasonable review and effective balance. The rationality of legislation can be explicitly stated in individual cases through the specific

14 Zhang Yaping, *Decriminalizing Application of Inevitable Cognition Error of Illegality of Legal Offences*, 6 Criminal Science 4 (2023).

15 Liu Yanhong, *The Development Direction of Chinese Criminal Law: Security Criminal Law or Freedom Criminal Law*, 2 Tribune of Political Science and Law 60 (2023).

reasoning of rights and order. Undeniably, with the continuous development of society, order has gradually gained a more independent value, but order can always be explained through rights at the substantive value level. Thirdly, attention should be paid to the role of policies. Although policies are flexible, their flexibility can effectively supervise acts aimed at maintaining order. Using the positive power value of policies to restrict the legislative purpose of statutory crimes and guide the interpretation and application of statutory crimes can promote the timely protection of rights. In terms of emphasizing the value consideration of crime prevention, if the infringement of order does not pose a danger or actual harm to rights, and the actor's infringement of order is not intentional, then there is no necessity for criminal punishment, and at this time, the maintenance of order should appropriately give way to the freedom of rights. In addition, the recoverability of order and the compensability of rights should also be considered to reasonably determine the balance between order and rights. Fourthly, we should conduct a substantive consideration of the derivative consequences of the damage to order interests and the consequences of criminal punishment for actors who deny cognition mistakes of illegality, and pay attention to the relevance of order interests and different prevention purposes.

*B. Reasonable Decriminalization of Acts Through
Normative Judgment of the Unavoidability of Mistakes*

‘The judgment of the avoidability of mistakes is a doctrinal solution for criminal imputation of actors who have cognition mistakes of illegality.’¹⁶ The legislation of statutory crimes focuses on order value and lacks direct legal interest infringement against individual rights. In this case, cognition mistakes of illegality have a stronger reason for decriminalization interpretation. Especially for criminal legislation that is both abstract dangerous crimes and collective legal interests, as well as statutory crimes and minor crimes, if the act cannot be effectively decriminalized at the objective element level, then the decriminalization interpretation of cognition mistakes of illegality can be completely used to reasonably restrict the scope of criminal punishment. For

16 Liu He, *The Avoidability of the Mistake of Law: Nature and Determination of Avoidability*, 3 Peking University Law Journal 801 (2024).

criminalization and decriminalization, a relative balance should be maintained. ‘Only by maintaining the balance between criminalization and decriminalization can the scope of crimes be kept within a reasonable range, thereby realizing the sound operation of criminal rule of law.’¹⁷ The necessary position of criminal law mitigation and the direction of decriminalization interpretation are conducive to reflecting the civilization of modern criminal rule of law.

The specific judgment of cognition mistakes of illegality should appropriately lean towards the actor in the sense of reflecting rights protection. If we do not actively give play to the decriminalization function of cognition mistakes of illegality in statutory crimes, it will undoubtedly further expand the scope of the establishment of crimes. Some views may hold that even if a cognition mistake of illegality is recognized, there are three possible results: first, it does not affect liability; second, it mitigates liability; third, it exempts liability. Therefore, even if a cognition mistake of illegality is established, mitigating liability does not necessarily lead to the decriminalization of the act. Admittedly, this is indeed the case in most statutory crimes. Cognition mistakes of illegality do not always lead to decriminalization, but only to a part of decriminalization results, and this part is the main object of the decriminalization interpretation of cognition mistakes of illegality.

C. Re-Clarification of Relevant Judgment Standards for Cognition Mistakes of Illegality

Although many scholars in China accept the theory of the unavoidability of cognition mistakes of illegality, they have not put forward operable standards for the judgment of the unavoidability of mistakes. Therefore, reasonable and clear judgment standards must be proposed.¹⁸ If we take rights protection as the starting point and requirement, we should actively construct the judgment standard for whether cognition mistakes of illegality can be avoided around the balanced state of rights and order. There are mainly three results in the case of cognition mistakes of illegality: first, when the claim of the existence of a cognition mistake of illegality is put forward

17 Qi Wenyan, *Revision of the Criminal Law Should Avoid the Tendency of Over-Criminalization*, 3 *Studies in Law and Business* 9 (2016).

18 Zhang Yaping, *The Adherence to the ‘Subordinate Theory’ of the Judgment of Illegality of Statutory Offenders*, 5 *Studies in Law and Business* 116 (2023).

but there is no reason for its establishment, it does not affect liability; second, when the claim of the existence of a cognition mistake of illegality is put forward and there is a reason for its establishment but it is avoidable, liability is mitigated; third, when the claim of the existence of a cognition mistake of illegality is put forward and there is a reason for its establishment, and it is unavoidable or there is a certain dispute about whether it can be avoided but it is a minor statutory crime, liability is negated. At this time, the situation of cognition mistakes of illegality belongs to the specific decriminalization interpretation. However, for the convenience of discussion, this paper involves both decriminalization interpretation and mitigation interpretation.

1. The Specific Judgment Standards for Cognition Mistakes of Illegality Are Diversified. — The specific judgment standard for whether a cognition mistake of illegality is established should be distinguished from the judgment standard for the unavoidability of the wrong cognition in the cognition mistake of illegality, because the judgment of unavoidability is a further typological judgment on the basis that the cognition mistake of illegality has been established. Therefore, the judgment standard for whether a cognition mistake of illegality is established should adopt the actor standard theory. The lack of cognition of illegality or a cognition mistake of illegality indicates that the actor has no subjective intention to oppose the existing normative order. At this time, the evaluation is naturally made from the actor's perspective, because whether the mistake is established is for the actor himself, and whether the establishment of such a mistake is excusable is a general evaluation in the social sense. For example, some views hold that 'the existence of cognition of illegality is a judgment made by synthesizing various factors of the actor at that time.'¹⁹ The content of the judgment here still limits the subject to the actor, takes the standard of the actor as the judgment basis, and also reflects the individual characteristic of rights. Even if a cognition mistake of illegality in an individual case is not established from the perspective of ordinary people, it may still be established for the actor. Although the actor standard is the main basis for judging whether a cognition mistake of illegality is established, the ordinary person standard will also be adopted to a certain extent. The reference to the ordinary person standard is to better determine and correct the actor

19 Zhao Xing, *A Reconsideration of Awareness of Illegality*, 6 Legal Forum 33 (2016).

standard, so as to prevent obvious deviations in the specific grasp of the actor standard. However, in terms of the actor's right to claim the existence of the cognition mistake of illegality, its essence is still the actor standard theory. Adopting the actor standard has two logical results: first, the actor standard conforms to the scope of the subject generally presupposed by the norm, and the content of whether the cognitive mistake can be avoided can be further examined; second, the standard of the actor is inconsistent with that of the ordinary person, that is, it is an exceptional situation presupposed by the norm. At this time, if it is obviously inconsistent with the ordinary person's cognition, the cognition mistake of illegality is not established; if the inconsistency with the ordinary person's cognition is reasonable, even if the ordinary person thinks that there should be a correct cognition of illegality, the cognition mistake of illegality is still established. Therefore, in most cases, the judgment is made based on the actor standard. On the issue of whether the cognition mistake of illegality is established, the scope of the establishment of the cognition mistake of illegality should be relaxed as much as possible. After all, there is still a subsequent review of whether the cognitive mistake can be avoided, which will not lead to the consequence of indulging in criminal acts.

2. *The Actor Standard Theory as the Judgment Standard for Whether a Cognition Mistake of Illegality Is Established.* — In the type of statutory crimes, the claim of a cognition mistake of illegality arises when the actor feels that there is an inconsistency between objective reality and subjective normative cognition. Once the claim of a cognition mistake of illegality is regarded as a right of the actor, then as long as it does not violate obvious common sense, there will naturally be no dispute between the actor standard and the ordinary person standard. Because it is a claim put forward by the actor, it should be based on the standard of the actor, which is conducive to avoiding the emptiness of the right claim in the specific judgment process. 'In specific individual cases, based on the principle of liability, the selection of the benchmark for judging cognition of illegality should adopt the individual standard of the actor rather than the social standard of ordinary people.'²⁰ The occurrence of a cognition mistake of illegality is the inconsistency between the actor's subjective cognition and the objective norm, especially the misunderstanding

20 Li Guoquan, *Empirical Analysis and Class Judgment on the Perception of Illegality: Based on 769 Criminal Judgments*, 1 Social Sciences in Xinjiang 99 (2021).

of the administrative prepositive law norms related to criminal law, which is mainly due to the actor's own problems. In this regard, it is natural to adhere to the actor standard theory in the sense of whether the mistake is established. To illustrate this point, we could take the high-altitude parabolic incident that occurred in Luzhou, Sichuan Province as an example. If the actor's act of throwing cigarette butts from a high altitude does not negate criminal illegality at the objective constitutive element level, then in the process of trying to make a decriminalization interpretation of the act on the ground of a cognition mistake of illegality, since natural crimes are closely related to moral ethics, while statutory crimes are relatively distantly related to moral ethics, to reduce the burden on legal audiences and reflect the requirement of rights protection, the actor should first be affirmed to have the right to claim a cognition mistake of illegality. When the actor claims the existence of a cognition mistake of illegality, the actor standard should be adopted in principle. In this case, the ordinary person standard of society is too abstract, and the standards of other specific individuals will be diversified. The question of whether the cognition mistake of illegality is established is raised by the actor, who explains that he really did not know that the act was illegal and why such cognition existed. Throwing cigarette butts casually is an immoral act, but when there are no flammable substances downstairs, and the weight of the cigarette butt will not cause the danger of injuring others, it is just like throwing a piece of paper from a high altitude, which will not be associated with criminal illegality at all, and even not with administrative penalties. These are further explanations after the actor claims the existence of a cognition mistake of illegality.

3. The Corresponding Judgment Logic for Whether a Cognition Mistake of Illegality Can Be Avoided. — Regarding the issue of whether a cognition mistake of illegality can be avoided, the liability theory is consistent with China's criminal policy at present. By excluding liability for actors with cognition mistakes of illegality instead of excluding intent in the ontological sense to negate the establishment of a crime, it is more conducive to shaping the effectiveness of norms, crime prevention, and the implementation and enforcement of the law.²¹ Admittedly, the liability theory balances rights and order more than the intent theory. On the one hand, it reflects the rights

21 Li Yalong, *Research on Theoretical Paths Where Mistake of Illegality Prevents the Establishment of Crimes*, 4 New Horizons from Tianfu 117 (2023).

orientation; on the other hand, it proclaims the authority of norms in the sense of order maintenance. 'To coordinate the diversified interest demands behind the issue of cognition mistakes of illegality, a dynamically balanced criminal policy benchmark is needed.'²² After the actor claims the existence of a cognition mistake of illegality, the further specific judgment of whether the mistake can be avoided is based on the establishment of the actor's cognition mistake of illegality. After adopting the actor standard, once the actor's cognition mistake of illegality is established, it has been presupposed that the law will tend to the position of mitigating the actor's liability, but the degree of such mitigation needs to be distinguished according to different situations. That is, only when the cognition mistake of illegality has been established and the actor will be given a lighter sentence or exempted from criminal liability, will the issue of whether the cognition mistake of illegality can be avoided be involved. However, if the actor standard theory is continued to be adopted, the mistake is likely to be unavoidable. When the actor standard is adopted and the establishment of the cognition mistake of illegality has been determined, it is obviously redundant to discuss the issue of whether the mistake can be avoided and still adopt the actor standard theory, because the result of continuing to adopt the actor standard will inevitably lead to the conclusion that the mistake is unavoidable; otherwise, the mistake will not be established. In this way, in the judgment of whether the cognitive mistake can be avoided, it is absolutely impossible to adopt only the actor standard, but must mainly adopt the ordinary person standard and supplement it with the actor standard.

The judgment of whether a cognition mistake of illegality can be avoided is a normative judgment, which focuses on examining whether the actor has fulfilled a sufficient normative duty of care. The subject of this normative evaluation is the abstract ordinary person in society, and its core is to construct the judgment standard for the avoidability of mistakes in cognition mistakes of illegality around the opportunity and degree of understanding the law. Firstly, actively finding out and understanding the law should not be confused with the issue of cognition mistakes of illegality. The normative duty of care is the requirement for the actor to actively find out the law. For example,

22 Wu Tong, *Systematic Positioning and Practical Application of Erroneous Understanding of Illegality from the Perspective of Criminal Defense*, 3 *Journal of Henan University of Economics and Law* 151 (2024).

people engaged in specific industries need to understand the relevant industry regulations and the relevant regulations of criminal law in this field; otherwise, this prior normative duty of care is sometimes not obvious for ordinary people. After all, for the actor, the law is not like learning to read and write. Legal norms are characterized by complexity and variability. In this regard, most countries usually attach more importance to official professional opinions when determining that a cognition mistake of illegality is unavoidable, and the legal opinions put forward by lawyers often cannot be used as a defense for ‘unavoidability’.²³ For the active finding of the law, two aspects should be mainly noted. On the one hand, the active inquiry into the law as a reason for decriminalization interpretation is mainly aimed at people in specific industry fields. For such people who need to bear special duties of care, they can even establish compliance content for individuals in terms of cognition of illegality by imitating corporate criminal compliance. On the other hand, for ordinary people, even if they do not actively find out the relevant legal provisions, it cannot be presumed that they have cognition of illegality. In other words, this aspect can be used as a reason for negating liability, but it has a focus and cannot be used as an aspect for presuming the existence of liability. The object of consultation is not the key to determining whether the actor’s cognitive mistake is established, but the rationality of the establishment of the mistake needs to be examined substantially. Secondly, the objective opportunity to find out the law and the actor’s efforts are an evaluation that takes both the actor standard and the ordinary person standard into account. At this time, various abstract standards may be continuously transferred back and forth, and it is still impossible to realize the typification of specific judgments as much as possible. In this regard, some views hold that ‘we should proceed from both objective and subjective aspects to conduct judgment and analysis. Objectively, it is necessary to see whether the actor can recognize the illegality of the act or has doubts and scruples about the illegality of the act according to the objective situation under specific circumstances; subjectively, it is necessary to examine whether the actor has made efforts in the situation at that time.’²⁴ In fact, it still conducts substantive judgment and comprehensive

23 Zhang Zetao, *Judicial Determination and Handling of Inevitable Illegal Cognition Mistake of Administrative Commitment*, 1 *Tribune of Political Science and Law* 186 (2022).

24 Shu Dengwei, *Research on Judicial Judgment of Possibility of Illegal Cognition*, 2 *Journal of Gansu University of Political Science and Law* 137 (2022).

measurement, and it is difficult to unify the clearest standard. After all, cognition of illegality is first of all a rationality issue, and then it seeks to achieve the best rationality within the scope of legality.

In the sense of seeking rationality, more substantive factors can be included around whether the mistake can be avoided. For the cognition mistake of illegality that should be able to mitigate or negate liability by affecting liability, it is also in line with the thought of prudent punishment advocated in ancient China. In the eyes of the ancients for social governance, it can be said that the law ensures good governance when properly applied, while it brings about chaos when misused. The ‘inaction’ shown in legislation, judicature, and social governance is the way and wisdom to achieve good laws and good governance, and the view of prudent punishment is an important concept in ancient Chinese judicature.²⁵ In the process of vertically observing and reasonably drawing on the ancient legal system and culture, we should also pay attention to combining it with the current era. ‘Society is changing, and the times are changing. Regarding China’s traditional legal system and culture, we should attach great importance to them on the one hand, and pay attention to their transformation in modern society on the other hand.’²⁶ Taking the view of merciful punishment as an example, it mainly corresponds to the principle of modesty of criminal law at present, but the thought of merciful punishment is broader than the principle of modesty. It is not only reflected in the principle of criminal law as a last resort at the level of criminal legislation, but also reflected in the fact that criminal judicial personnel should have a compassionate feeling and understand some severe consequences of criminal law. In cases involving cognition mistakes of illegality, the substantive judgment of whether the mistake can be avoided should always uphold such a view of merciful punishment, and the reasoning of decriminalization interpretation should conform to the basic concept of fairness and justice of the people. Only in this way can the rationality of the handling of such cases be realized as much as possible within the framework of legality.

For the judgment standard of whether the mistake can be avoided,

25 Ruan Zhiyuan & Zhao Xiaogeng, *The Source of Thought, System Expression and Contemporary Inheritance of Good Laws and Good Governance in Ancient China*, 11 *People’s Procuratorial Semimonthly* 56 (2023).

26 Liu Renwen, *Further Discussion on Strengthening the Subjectivity of Chinese Criminal Law Research*, 4 *Modern Law Science* 107 (2023).

in order to follow the people's concept of fairness and justice and realize the unity of political, legal, and social effects, the interpreter should take the ordinary person standard as the starting point of judgment, and then appropriately adjust it with the actor standard. 'If ordinary people, proceeding from common sense, general knowledge and ordinary feelings, still inevitably make legal cognitive mistakes after prudent judgments, criminal liability should be exempted at this time. Although there are certain differences in the cognitive level of each individual in society, for ordinary people, the judgment of whether a cognition mistake of illegality is unavoidable should be made according to the cognitive level of similar groups.'²⁷ Firstly, in the process of decriminalization interpretation of cognition mistakes of illegality, after the actor claims the existence of a cognition mistake of illegality, and concludes that the mistake is indeed established based on the actor standard, the judgment of the possibility of avoiding the result needs to measure whether it is really unavoidable according to the ordinary person standard, and finally conduct a comprehensive comparative measurement to see to what extent the actor deviates from the ordinary person standard at the level of normative cognition, and demonstrate such deviation to explain whether such deviation is worthy of attention and understanding. For example, some views point out that 'the cognition mistake of illegality arising from the conflict between the actor's cognition of the legality of the act formed in the long-term life process and the actually effective legal norms should be regarded as an unavoidable cognition mistake of illegality.'²⁸ Factors such as the actor's living environment, habits and individual cognition are taken into account. In the judicial judgment process, various specific measurement factors are compared and measured between the actor and social expectations, and while applying the interpretation to individual cases, the future guiding role of judicial decisions is also considered. 'To solve the problem of cognition mistakes of illegality, attention should be paid to giving play to the guiding role of criminal law judgment norms on the ought-to-be value and the future order.'²⁹ In this regard, interpreters should prevent ignoring individual rights due to utilitarian orientation in judicial application, because cognition

27 Zhang Zetao, *supra* note 23, 188.

28 Zhang Yaping, *supra* note 14, 3.

29 Feng Yadong, *Cognizance of Illegality and Recognition of Criminal Law*, 3 Chinese Journal of Law 112 (2006).

mistakes of illegality will involve policy issues, and ‘the order function of public policy determines that it is necessarily utilitarian-oriented’.³⁰ It is difficult to reasonably solve relevant problems by relying solely on the standard presupposition of the avoidability of mistakes itself, because there will be abstract setting problems at different levels. Instead of continuously abstracting, it may be better to return to the normative evaluation, and based on endowing such an abstract standard with strict and sufficient reasoning around different substantive contents, assist other systematic interpretation methods to achieve the proper solution of relevant problems.

When the actor has a wrong understanding of the relevant legal norm content, he believes that his act is not a crime, and the occurrence of such a wrong understanding is not due to the actor’s lack of basic normative literacy as a citizen, but because there are indeed insurmountable obstacles to a complete cognition of the relevant norms, the interpreter’s adherence to the position of decriminalization orientation and the direction of decriminalization interpretation is a reasonable forgiveness made by the law and society to the actor. The specific judgment logic of cognition mistakes of illegality in the sense of excluding or mitigating is as follows: firstly, the actor raises the claim of cognition mistake of illegality (right to defense). Secondly, judgment is made on whether the cognition mistake of illegality is established (actor standard, right priority). If the cognition mistake of illegality is established, we examine the avoidability of the mistake (mainly ordinary person standard, supplemented by actor standard, taking into account rights and order). Finally, we reach the conclusion of no liability or reduced liability.

IV. CONCLUSION

Taking rights and order as the jurisprudential basis for the issue of cognition mistakes of illegality in statutory crimes is not a leap, but has jurisprudential and systematic advantages. The legislation of statutory crimes itself focuses on the direct maintenance of order value, with the protection logic of collective legal interests, including the maintenance of administrative management order.

30 Lu Jianping, *The Criminal Policies and Criminal Law in Risk Society*, 4 Legal Forum 21 (2011).

The actor's right to defense of the existence of a cognition mistake of illegality mainly focuses on the protection of the rights value, and a series of issues related to it are based on and guided by the element of rights, which is reflected in the reasonable balance between the freedom of rights, the maintenance of order, and other value contents. The protection of rights is a basic value presupposition of the modern rule of law, which will not arbitrarily increase the state's obligation burden. In this regard, we should follow the concept of value balance between rights and order, and then actively construct the interpretation theory of statutory crimes at the liability level. Among them, the judgment of the avoidability of mistakes is a response and demonstration obligation that judicial authorities should bear after the actor claims the existence of a cognition mistake of illegality, which is conducive to strengthening judicial justice. Exploring the decriminalization plan for cognition mistakes of illegality in statutory crimes is also a kind of decriminalization at the judicial level, which has practical and theoretical significance. From the perspective of the modernization of social governance, in order to better solve the relevant problems of cognition mistakes of illegality in statutory crimes, we should also pay attention to strengthening the corresponding legal popularization education to enhance the general effect of knowing the law in society, so as to better promote the balanced demonstration process based on rights and order as the jurisprudential basis when facing the situation of cognition mistakes of illegality.

(Edited by Li Jiesi)

违法性认识错误的法理内涵及其规范判断

内容提要 违法性认识错误的情形主要存在于法定犯的类型中,而法定犯的立法价值侧重于对秩序的规范维护。允许行为人提出存在违法性认识错误的抗辩符合权利保障的要求。立足于现代法治原则以及权利与秩序的相互平衡,应当承认违法性认识错误会影响责任判断,进而确立违法性认识错误时的责任阻却或者责任减轻的具体判断标准。违法性认识错误成立的判断应当采取行为人标准,其对应权利优先的逻辑,而错误是否具有可避免性的判断则应当以社会一般人标准为主,兼采行为人标准,其对应秩序优先、兼顾权利平衡的逻辑。
